

# CASE COMMENTARY

## 'Global Precedent' or 'Reasonable No More?': the *Mazibuko* case<sup>1</sup>

**MALCOLM LANGFORD**

*Research Fellow, Norwegian Centre for Human Rights, University of Oslo*

**ANNA RUSSELL**

*Louwes Research Fellow, Oxford University Centre for the Environment*

*Mazibuko et al v City of Johannesburg et al*  
High Court of South Africa (Witwatersrand Local Division)  
30 April 2008 Case No 06/13865

### THE FACTS

The applicants in this case challenged the introduction and use of prepaid water meters and the set amount of free water provided to each household per month. At the time of the application, all five applicants were residents of the township of Phiri, a historically black and poor area which forms part of Soweto, within the City of Johannesburg.<sup>2</sup> Prior to 2001, the applicants received an unlimited supply of water at a flat rate, but despite this, many account holders, including the applicants at that time, were in arrears with their payment. Other residents of the city received an unlimited water supply on credit.<sup>3</sup>

In 2001, the City of Johannesburg and Johannesburg Water,<sup>4</sup> (the respondents), agreed to provide every household with 6 kL of free water per month. This is commonly referred to as free basic water or FBW. Within Phiri, the FBW was to be dispensed through the use of a prepaid meter system.<sup>5</sup> The meters operate on the basis that, once the FBW has been consumed, any further water must be purchased in advance, rather than on credit. If consumers are not able to purchase water in advance, the meter will not dispense any further water.

In 2004, the prepaid meter system was implemented as a credit control measure and as a means of reducing

water wastage. The entire water piping system of the township was in significant need of rehabilitation. The residents were advised by notice to opt for the installation of prepaid meters. If they did this, their accumulated arrears would be written off. If they did not, they would be without water services.<sup>6</sup> The first applicant, Lindiwe Mazibuko, initially refused to have a prepaid meter installed and walked to a reservoir three km away. The reservoir was closed to her seven months later, at which time she relented and accepted the installation of a prepaid meter.<sup>7</sup> According to the judgment, the applicants typically consumed one month's allocation of FBW within about the first two weeks. This meant that they would not have access to water services for the next two weeks before the release of the subsequent allocation of FBW in the following month.<sup>8</sup>

Section 27(1)(b) of the South African Constitution states that '[e]veryone has the right to have access to sufficient food and water.'<sup>9</sup> The state is required to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.<sup>10</sup> The Water Services Act defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.<sup>11</sup> The corresponding government regulation, issued by the third respondent, the Department of Water Affairs and Forestry (DWAf), s 3, states:

- 3 The minimum standard for basic water supply services is –
  - (a) the provision of appropriate education in respect of effective water use; and

1 The title is taken in part from two contrasting news articles: (i) South Africa: 'Court Ruling on Water Sets "Global Precedents"' *UN Office for the Coordination of Humanitarian Affairs: Humanitarian News and Analysis* <http://www.irinnews.org/report.aspx?ReportId=78076>; (ii) 'Water Case: 'Reasonable' No More?' *Mail and Guardian Online: Opinion – Comment and Analysis* (<http://www.mg.co.za/article/2008-05-14-water-case-reasonable-no-more>).

2 *Mazibuko et al v City of Johannesburg et al (Mazibuko)* High Court of South Africa (Witwatersrand Local Division) 30 April 2008 Case No 06/13865 Judgment [5]. One of the applicants has since left Phiri. However, she still pursued the application on behalf of her household.

3 Judgment [3], [101].

4 Johannesburg Water's sole shareholder is the City of Johannesburg. As allowed for in the Water Services Act 1997, Johannesburg Water is delegated to act as a water service provider for the City. Judgment [6].

5 Judgment [3].

6 *ibid* [19].

7 *ibid*.

8 *ibid* [84]. The applicants are unemployed, and other than the state pension or grant, which they receive monthly, they have no other source of income. [92].

9 Constitution of the Republic of South Africa 1996.

10 *ibid* s 7(2).

11 Water Services Act 1997 s 1(iii). Section 9(1)(a) of the same Act empowers the Minister of Water Affairs and Forestry to prescribe compulsory national standards relating to the provision of water services.

- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –
- (i) at a minimum flow rate of not less than 10 litres per minute;
  - (ii) within 200 metres of a household; and
  - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.<sup>12</sup>

The applicants' claim contained two key challenges. First, they disputed the validity of s 3(b) of the above regulation on the grounds that it is based on misconception, does not provide for 'sufficient' water as provided for in the Constitution, is irrationally determined, does not relate to the needs of the poorest people, is arbitrary, inefficient and inequitable, does not distinguish between those with waterborne sanitation and those without and is inflexible.<sup>13</sup> They sought an order declaring that Regulation 3(b) is unconstitutional and invalid.<sup>14</sup>

Secondly, they challenged the respondents' decision to disconnect their unlimited water supply at a fixed rate, introducing and continuing to use prepaid meters, and setting the amount of FBW at 25 L/person/month or 6 kL/household/month, as unconstitutional and unlawful.<sup>15</sup> The applicants argued that the decision introducing the prepaid meters should be reviewed and set aside on the grounds that it violates the principle of legality, the state's duty to take reasonable measures to realise progressively the right to water, the state's duty to respect the right to water, the prohibition of discrimination and the right to equality and procedural fairness.<sup>16</sup> In addition, they sought a further order declaring that each applicant, and any other similarly situated resident of Phiri, is entitled to 50 L/person/day, and that an option of a metered supply of water be installed at the cost of the respondents.<sup>17</sup>

## THE DECISION

### *Locus standi* and non-joinder of the National Treasury

By way of preliminary matters, Justice Tsoka found that the applicants had standing and were entitled to act on behalf of members of their household, as well as other similarly affected residents of Phiri.<sup>18</sup> The argument that all water services authorities and all residents of Phiri should be joined was rejected as this would be cumbersome, impractical, and unnecessary.<sup>19</sup> The judge also refused to accept the submission by the third respondent that the National Treasury should be joined in the action in addition to the Minister of Water Affairs and Forestry. The Minister argued that an

increase in the amount of FBW would increase the equitable share funding allocated to the water services authority by the National Treasury under the Division of Revenue Act. The judge found that there was no evidence that the respondents use the equitable share to provide FBW in Johannesburg, nor that they cannot use the municipal tax base to provide it. He was not persuaded that it had a material or substantial interest in the orders sought by the applicants.<sup>20</sup>

### The constitutionality and validity of Regulation 3(b) – 25 L/person/day or 6 kL/household/month

In assessing the applicant's argument that Regulation 3(b) is based on misconception, the judge recognised that it was necessary to consider international law concerning the right to water as this may guide interpretation of the South African right. This review included the General Comment No 15 on the Right to Water, which was issued by the UN Committee on Economic, Social and Cultural Rights in 2002.<sup>21</sup> Among other aspects, the General Comment provides that the water services and supply required to meet the right to water must be available, physically and economically accessible, and of acceptable quality. The state has a legal obligation to realise progressively the right and, specifically, must respect, protect and fulfil the right to water. If retrogressive measures are taken, the state bears the burden of proving that they are justified by reference to the totality of the rights provided for in the International Covenant on Economic, Social and Cultural Rights. Citing other international treaties which either explicitly or implicitly reference water, the judge briefly concluded that the state is obliged to provide free basic water to the poor.<sup>22</sup>

In determining whether Regulation 3(b) falls short of providing 'sufficient' water as provided for in s 27(1)(b) of the Constitution, as well as whether it is irrational, inefficient, inequitable, and inflexible, as argued by the applicants, the judge also looked towards the international legal arena.<sup>23</sup> According to General Comment No 15, the quantity of water available for each person should correspond to World Health Organisation Guidelines.<sup>24</sup> The judge stated that the WHO Guidelines quantify basic access to water as 25 L/person/day, which is the lowest level to maintain life over the short

12 Regulations Relating to Compulsory National Standards and Measures to Conserve Water (8 June 2001) No R 509.

13 Judgment [27].

14 *ibid* [11].

15 *ibid* [9].

16 *ibid* [71].

17 *ibid* [11].

18 *ibid* [16]–[20].

19 *ibid* [23].

20 *ibid* [22].

21 General Comment No 15 (2002) – The Right to Water (26 November 2002) UN Doc E/C 12/2002/11. The General Comment provides that the right to water falls within the category of guarantees necessary to secure an adequate standard of living (art 11) and is inextricably related to the right to health (art 12) of the International Covenant on Economic, Social and Cultural Rights.

22 Judgment [29]–[40]. The judge referenced the Convention on the Rights of the Child (art 24), the African Convention on the Rights of the Child (art 14), and the African Charter on Human and Peoples' Rights (art 16). The respondents had argued that they are not obliged to provide free basic water to the poor, but that their obligation is to provide water at a fee as stipulated in the Norms and Standards for Water Services Tariffs.

23 Judgment [43]–[46].

24 General Comment No 15 [12] references G Howard, J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) WHO WHO/SDE/WSH/03.02. It also references P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water Intl* 83.

term – assuring consumption, although not necessarily personal or food hygiene.<sup>25</sup> The judge also referred to the Human Development Report 2006 as stating that 20 L/person/day constitutes sufficient water.<sup>26</sup> Commenting on both the hydrological and political reality of South Africa, and stressing that the regulations provide for a *minimum* standard for basic water supply services, the judge stated that it was understandable why DWAF had set the minimum standard as it did, as it would allow every water services authority to assure basic provision of water. Depending on its resources and the residents' needs, the water services authorities may increase this minimum standard, as has already occurred in certain localities. As organs of the state, water services authorities are obliged to realise progressively the right to water. However, in short, the judge found that there was no basis for reviewing and setting aside Regulation 3(b).<sup>27</sup>

### The unconstitutionality and unlawfulness of the introduction of prepaid meters

The judge declared that the installation of prepaid meters in Phiri was unconstitutional and unlawful. He started by dismissing the respondents' argument that the introduction of prepaid meters was executive (as opposed to administrative) action, and thus not reviewable by the court. After an exhaustive review of the distinction between executive policy decisions and administrative implementation, he found that the case fell under the latter. The applicants were not challenging the political decision of introducing prepaid meters, but rather their actual introduction in Phiri. Noting that the residents of Phiri had been consulted to obtain their views regarding the introduction of prepaid meters, and that they had been sent notices to choose one of three levels of offered services, the judge found that this particular participation of the residents was indicative that the introduction of the prepaid meters was administrative action.<sup>28</sup>

In assessing whether the disconnection of the applicants' unlimited access to water at a flat rate and the introduction of prepaid meters was in violation of the state's obligation to respect the right to water, the judge found that the respondents' interference with the applicants' access to unlimited water at a flat rate was understandable, as such an approach was unsustainable. In fact, he stated that it would be unconscionable to expect the respondents, faced with water scarcity, huge water losses, and continuous unrecoverable financial losses, to perpetuate such a practice while faced with the constitutional task of meeting the various needs of the residents.<sup>29</sup>

In assessing the applicants' argument that the introduction of prepaid meters violates the principle of legality, the judge noted that water services authorities may only limit or discontinue the supply of water if authorised by law. Section 21 of the Water Services Act provides that every water services authority must make bylaws which contain conditions for the provision of water services. The bylaws must provide for the circumstances under which water services may be limited or discontinued, as well as the procedures for doing so.<sup>30</sup> After reviewing the city's bylaws, the judge found that they authorise the installation of prepaid meters only as a penalty for contravening the conditions of the supply of water services. They have no other source in law. Their installation was thus found to be unlawful. In addition, the judge found that the prepaid meters violated Regulation 3(b)(ii), quoted above, which provides that no consumer is to be without a minimum quantity of potable water for more than seven full days in any year. It was explained that the applicants spent about two weeks each month without access to water once the FBW had been consumed, and such a limitation was not authorised by the bylaws.<sup>31</sup>

Referencing a number of foreign cases on the issue of limitation or discontinuation of water supply provided by the *amicus curiae*, the Centre on Housing Rights and Evictions, the judge went on to state that '[i]t is apparent that in the established democracies, prepayment meters are illegal as they violate the procedural requirement of fairness by cutting off or discontinuing the supply of water without notice or representation'.<sup>32</sup> In this case, he found that prepaid meters cut off water supply without reasonable notice to the applicants and denied them an opportunity to make representations, for example, regarding inability to pay. The signal warning that the meters emit when there is insufficient credit for the supply of water was found to be artificial and unhelpful.<sup>33</sup>

Later in the judgment, when addressing directly the argument that the introduction of prepaid meters was procedurally unfair, the judge agreed with the applicants, finding that there had been inadequate consultation and notice.<sup>34</sup> The judge found that the notice was misleading as it suggested that different levels of water service were required to be offered by the Water Services Act and that the only level of service suitable to the applicants involved the installation of prepaid meters. He found that it was unfair to indicate that the applicants have no election to choose another level of service and simply to impose an election on the basis

25 Judgment [46].

26 *ibid* referring to *UNDP Human Development Report 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis* (OUP New York 2006).

27 Judgment [47]–[54].

28 *ibid* [56]–[70]. The action was reviewable under s 33 of the Constitution. It was not found to come within the exemptions provided for within the Promotion of Administrative Justice Act 2000.

29 *ibid* [96]–[103].

30 Water Services Act s 21(f).

31 Judgment [73]–[84].

32 *ibid* [91], [85]–[91]. Under s 39(1)(c) of the Constitution, a court may consider foreign law when interpreting the Bill of Rights.

33 *ibid* [93].

34 *ibid* [104]–[107]. For example, there was no consultation with the first applicant and no proper notice was given to her (eg her right to object to the introduction of the prepaid meter, request reasons for the decision etc). The judge dismissed supplementary affidavit evidence filed by the respondents that there had been suitable consultations on the basis that the majority of the deponents were either employees or councillors of the city and thus not in a position to be objective or act contrary to the interests of the city.

of failure to respond to the notice.<sup>35</sup> The purpose of the subsequent visit by Johannesburg Water's community facilitators to provide further information was questioned, and appeared to be simply an attempt on their part to make the process appear reasonable and fair.<sup>36</sup> The respondents' actions were viewed as a publicity drive for prepaid meters, rather than as consultative.<sup>37</sup> As noted above, the judge also found that prepaid meters meant that consumers were not given reasonable notice regarding the termination of water services, or an opportunity to make representations to prove that they were unable to pay for basic services prior to disconnection, as required by s 4(3) of the Water Services Act.<sup>38</sup>

The installation of the prepaid meters was also found to constitute indirect and direct discrimination. While prepaid meters were introduced in Phiri, historically a black and poor area, wealthier and formerly white areas were not pressured to adopt prepaid meters. Instead, the latter have the option to obtain water on credit, and if they fall into arrears, receive notification before their water supply is cut off. They have the opportunity to make representations and arrangements to settle their arrears. The denial of this right to the residents of Phiri was found to be unreasonable, inequitable, and discriminatory on the basis of colour.<sup>39</sup> Later the judge found that this differentiation violated the right to equality and rejected the respondents' argument that the applicants do not qualify for water on credit under the National Credit Act 2005. Finding the underlying basis for the introduction of prepaid meters to be credit control, he stated that he was 'unable to understand why this credit control measure is only suitable in the historically black areas and not the historically rich white areas. Bad payers cannot be described in terms of colour or geographical areas'.<sup>40</sup>

Furthermore, as many domestic chores in South Africa are performed by women, and many households in poor black areas, such as Phiri, are headed by women, the judge indicated that the prepaid meters discriminate against women unfairly and thus also constitute discrimination on the basis of sex.<sup>41</sup>

35 *ibid* [108]–[110].

36 *ibid* [111]–[112]. The judge found that there was no evidence that subsequent notices (which again indicated that the applicants only have one available choice) were received by the applicants.

37 *ibid* [122].

38 *ibid* [119]. Section 4 of the Water Services Act states that '[w]ater services must be provided in terms of conditions set by the water services providers'. Section 4(3) provides that the procedures for limitation or discontinuation of water services must be fair and equitable, provide for reasonable notice and an opportunity to make representation, and not result in a person being denied access to basic water services for non-payment where that person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services. The judge also found that the terms and conditions which were part of the first applicant's application for a prepaid meter were contrary to the Water Services Act and have no source in law. Thus the termination of her water services was illegal.

39 *ibid* [94].

40 *ibid* [154]; [151]–[155].

41 *ibid* [159].

## Entitlement to 50 L/person/day and the option of a metered supply of water

The judge agreed with the applicants that in this particular case the amount of free water of 25 L/person/day or 6 kL/household/month was insufficient and unreasonable. The judge stated that '[t]he respondents are, in terms of section 27(2) [of the Constitution], obliged to provide more than the minimum if its residents' needs so demand and they are able, within their available resources, to do so'.<sup>42</sup>

The judge evaluated the respondents' special cases policies introduced in 2002 and targeted at pensioners, disabled persons, unemployed persons or persons with low income, and individuals with HIV/AIDS.<sup>43</sup> In 2004, the policy was amended to encourage more households to register as indigent. The incentive for doing so was the writing off of accrued arrears if the account holder agreed to the installation of a prepaid meter.<sup>44</sup> After various other amendments, the city decided on a new social package with a targeted date of implementation as July 2008. Other interim measures were adopted, but these had not yet been implemented at the time of the hearing. In tandem with the court decision, the city introduced a process whereby residents with special needs could make representations for an additional allocation of water of 4 kL/month FBW, as well as an additional 4 kL/year for emergencies. The judge found, however, that the social policies were irrational and unreasonable; the underlying objective was to encourage the installation of prepaid meters, which had no source in law.<sup>45</sup>

Given that many of the residents of Phiri are poor, elderly people, surviving on state pension grants and/or sick with HIV/AIDS, the judge found, relying on expert affidavit evidence, that 25 L/person/day was insufficient. He noted that the 6 kL/household/month is based on a household of eight persons, and that in Phiri the average household contains a minimum of 16 persons. The number of residents per yard or account holder is even greater due to the presence of informal settlers.<sup>46</sup>

The judge stated that it was 'uncontested that the respondents have the financial resources to increase the amount required by the applicants per person per day'. The judge found that they had decided to re-channel the 25 L/person/day free to households that cannot afford to pay, and that the equitable share that the respondents are allocated by the treasury had not been utilised. Furthermore, the judge found that the various special cases policies adopted by the respondents indicate that they have the ability to provide more water than the 25 L/person/day. He concluded that the respondents would be able to provide 50L/person/day without straining water supplies or financial resources.<sup>47</sup>

42 *ibid* [126].

43 *ibid* [138]–[139]. Any person who wished to benefit from the policy had first to register as indigent.

44 *ibid* [140].

45 *ibid* [141]–[150].

46 *ibid* [168]–[179].

47 *ibid* [181].

Setting aside the respondents' decision to limit FBW supply to 25 L/person/day or 6 kL/household/month, the judge ordered the respondents to provide each applicant and other similarly placed resident of Phiri with a FBW supply of 50 L/person/day and the option of a metered supply installed at the cost of the city.<sup>48</sup>

## COMMENTARY

The judge's statement that 'To deny the applicants the right to water is to deny them the right to lead a dignified human existence'<sup>49</sup> sets the tone of the judgment. Justice Tsoka links basic access to water with the principles of democracy, equality and freedom. The judgment deals with a number of key issues in the global debate on water services, including the move toward prepaid meters as a form of improved cost-recovery, stark geographical inequalities in levels of urban water services in many countries, and quantifying the minimum level of water needed for personal and domestic uses. It is perhaps not unexpected that the judgment has now been appealed to the Supreme Court of Appeal.

The judge's finding that there is an international human rights obligation to provide FBW to the poor is certainly surprising, but ultimately misleading. The international standards to which he refers only indicate that water costs should be affordable and that 'free water or low-cost' may be one policy option to achieve this end. Indeed, the expert evidence of Peter Gleick, which the judge quotes approvingly later in the judgment, also makes this point.<sup>50</sup> Whatever meaning the judge had in mind, this initial statement on free basic water has little influence on the rest of the reasoning in the judgment, although he obviously endorses the free basic water policy as a means to realise the right to water.

One issue that might arise on appeal is whether the ordering of an additional free 25 L/person/day constitutes illegitimate judicial interference in the policy-making process as it prescribes one option of providing additional affordable water instead of leaving it to the discretion of the government. Sandra Liebenberg points out, however, that the Constitutional Court of South Africa was prepared in the *Treatment Action Campaign* case,<sup>51</sup> which concerned provision of neviraprine to prevent mother-to-child-transmission of HIV, to be quite specific regarding the nature of services to be provided.<sup>52</sup> This was due to the circumstances of the case. The Constitutional Court found there was a lack of other medical options, it was supported by expert evidence, and the government had also chosen the drug in its pilot projects. Similarly, in the present case, it is possible to argue that the order was merely a

mandatory enforcement of the free basic water policy, which according to the government's own evidence constituted a floor for progressive improvement.

The decision that prepaid meters are substantively and procedurally unlawful follows a clear international trend in the jurisprudence, and the reasoning of the judge is solid in this regard. Indeed, as the case is likely to be heard eventually by the Constitutional Court, a similar order would possess considerable international influence, given that most comparative case law has emanated from lower courts. Leaving aside the procedural issue regarding the actual introduction of the prepaid meters, the case forcefully raises the broader question of whether the operation of prepaid meters can be procedurally fair – how can reasonable notice of termination of water services be given and how can residents be assured an opportunity to be heard prior to being cut off?

The finding that different policies for different geographical areas (in this case, prepaid meters for poor areas and meters with credit for wealthier areas) constitutes discrimination is both novel and significant in the global context. Geographical distribution of water services resources is highly skewed on the basis of wealth (within urban and rural areas and between urban and rural areas) even in a number of developed countries. Policies which unfairly differentiate between wealthier and poorer areas could increasingly come under attack on grounds of racial discrimination or nationality (for example, if the locality is dominated by minorities or migrants), other prohibited grounds of discrimination such as property status (particularly for informal settlements) or emerging attributes such as poverty and place of residence. Equally, women and girls in these poorer areas shoulder the burden of poor water access, and Justice Tsoka's decision that geographical differentiation constitutes indirect sexual discrimination is significant.

The aspects of the judgment that concern the quantity of water have been legally questioned in the South African context and the empirical evidence is likely to come under careful scrutiny in the appeal.<sup>53</sup> In an interesting section of the judgment, Justice Tsoka queries whether the Constitutional Court had in fact rejected the minimum core obligation for socio-economic rights. This principle has been propagated by the UN Committee on Economic, Social and Cultural Rights.<sup>54</sup> Justice Tsoka noted that the Constitutional Court had only indicated the difficulties for a court in construing the content of a minimum core obligation, not that it was out of the question.<sup>55</sup> He went on to indicate that a minimum core obligation could be developed for the right to water.

However, the critical parts of the judgment actually rely on the traditional reasonable review test of the

48 *ibid* [183]. He also ordered the respondents to pay costs of the applicants' three counsel.

49 *ibid* [160].

50 *ibid* [170].

51 *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

52 S Liebenberg 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in M Langford *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press New York 2008) 85–86.

53 See *Mail and Guardian Online: Opinion – Comment and Analysis* (<http://www.mg.co.za/article/2008-05-14-water-case-reasonable-no-more>).

54 In the case of the right to water, the Committee noted that there was a core obligation to ensure access to a minimum essential amount of water (General Comment No 15 [37(a)]).

55 Judgment [131].

Constitutional Court and make no reference to the minimum core obligation. The judge's disinclination to strike down Regulation 3(b) for setting too low a minimum amount was based on his finding that 25 L/person/day constituted a reasonable floor in the South African context of water scarcity and strained financial resources, particularly in some municipalities. Equally, the order for 50 L/person/day to be provided to Phiri residents in Johannesburg was made on the basis

that 25 L/per person/day for the Phiri residents was 'unreasonable' when the city possessed available financial resources, and that the formula for calculating the amount did not take into account the specific needs of Phiri residents or the large size of households.<sup>56</sup> Therefore, it is likely that the appeal will turn more on the question of whether 50 L/person/day is reasonable in the particular circumstances of this case.

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56 *ibid* [181].