

When Can a Court Refuse to Send an Unlawful Decision Back for Reconsideration?

INTRODUCTION

In the recent *Wild Coast*¹ case, the Constitutional Court had to decide what should happen once a government decision is found to be unlawful, but the underlying process could (at least in theory) still be fixed. In true judicial fashion, the answer, as elucidated below, boils down to “it depends”.

BACKGROUND

In 2014, the Department of Mineral Resources and Energy granted Impact Africa an exploration right to conduct seismic surveys off the Wild Coast. The right was subsequently renewed twice, and Shell later acquired an interest in it. Coastal communities and environmental organisations challenged the decision to grant the right, arguing they were never properly consulted and that the harm to marine life, the communities’ cultural ties to the sea, and climate change had all been ignored.

The High Court ultimately agreed and set the decisions aside in their entirety. On appeal, the SCA didn’t impugn any of the findings regarding the unlawfulness of the decision, but it did arrive at a different remedy. Rather than confirming the “set aside” order, it suspended the order and held that the defects could still be cured through proper consultation once the parties applied for a third renewal.

The matter was again taken on appeal and ultimately came before the Constitutional Court.

THE RULING

In instances where a court finds an administrative action to be unlawful, both section 172(1)(b) of the Constitution as well as section 8 of the Promotion of Administrative Justice Act (“PAJA”) give the court a wide discretion to grant any order it deems to be just and equitable, though neither provision confines the court to a fixed set of remedies. The court in this case outlined the 3 remedies most commonly used in PAJA reviews: set the decision aside and send it back to the administrator for fresh consideration (remittal); set it aside and substitute

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the court’s own decision (this requires exceptional circumstances); or simply set the decision aside without making any order as to remittal or substitution. The court noted that remittal is generally the starting point, in deference to the separation of powers.

In a judgement penned by Kollapen J, the court held that neither remittal nor substitution was appropriate in the circumstances and reinstated the High Court’s original order in which the decision was set aside outright, with no chance to patch the process at the renewal stage.

Two findings underpinned that outcome. Firstly, the court was of the view that remittal is not the automatic consequence of setting a decision aside. Some earlier authority suggested that once a decision is set aside, the underlying application stays “pending” by default, but the Court rejected that, holding that remittal must be justified on the facts each time rather than treated as the fallback position.

Secondly, the court found that setting a decision aside is not the same as the court deciding the matter itself. Shell and Impact Africa argued that refusing both remittal and substitution would leave the Court effectively ruling, in the Minister’s place, that the right should never be granted. The Court disagreed, finding that setting aside a decision only removes its legal effect (makes as if the decision was never made); it says nothing about the merits either way. It was on this basis that the court felt that it was not overstepping in ending the process entirely.

In weighing whether remittal was appropriate on the facts, the Court pointed to various factors, including:

1. The age of the record;
2. The conduct of Impact Africa in failing to consult affected parties;
3. a subsequent moratorium on new offshore exploration rights;
4. and the roughly R1.1 billion the companies had spent, which the Court held cannot outweigh a serious constitutional violation where the spender contributed to the unlawfulness in the first place.

THE IMPACT

This ruling is useful because it provides a clearer basis for arguing against remittal in review applications generally, not just in environmental or mining matters. The factors the Court relied on (a stale record, a respondent's own contribution to the unlawfulness, an intervening policy change, and discounted weight for sunk cost where the spender is complicit) are all transferable to procurement disputes, licensing decisions, and other PAJA reviews where a party secured a benefit through a flawed process years before the matter is finally resolved. It also confirms that remittal is not the automatic consequence of setting aside an administrative action.

1 Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others; Natural Justice and Another v Minister of Mineral Resources and Energy and Others (CCT 194/24; CCT 196/24) [2026] ZACC 33



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