

is open to all persons over the age of 18 who accept the programme and policy of the Party, undertake to carry out its decisions and pay their dues regularly. Such application must be made on the prescribed form and may be accepted or rejected by the District Committee. In paragraph 5 "the highest leading body" is in every instance the membership assembled in:

- (1) the National Conference which elects the Central Committee;
- (2) The District Conference which elects the District Committee;
- (3) the Branch meetings which elect the Branch Committee.

Decisions of the majority are binding on all members, and those of higher leading bodies on lower party bodies. District Conference and District Committee decisions are binding on all members and Party Organisations within the District, while Branch decisions and Branch Committee decisions are binding on all members of the Branch. In paragraph 6 the highest authority of the Party is the National Conference called annually by the Central Committee either in December or January. This Conference consists of delegates from Districts and Areas under Provincial District Committees on the basis of one delegate/...

gate for every thirty members. Members of the Central
Committee may attend the National Conference ex officio
with a right to speak and vote. Delegates to the
National Conference may not be held bound by mandate on
any question, but are free to vote as representative 5
members of the Conference. Under 6(f), the National
Conference decides the policy of the Party. Where
necessary it revises the programme and Constitution of
the Party. Proposed amendments to the Constitution may
be submitted to the National Conference only by the 10
Central Committee, District Committees, Committees and
Provincial Districts. The National Conference elects
by ballot a National Chairman and a General Secretary,
together with fifteen other members to constitute the
Central Committee until the next Annual Conference. A 15
special Annual Conference may be called between the
Annual Conferences if the Central Committee so decides
or if, after a request from one District, all Districts
are circulated by the Central Committee with reasons for
the request and the majority of the Districts supports 20
such a request. In terms of paragraph 7 the Central
Committee is the highest authority of the Party between
Conferences. Its function is to carry out the policy
of the National Conference and it represents the Party
in/...

in relation to other Political Parties. It controls
also all central property and funds through its treasurer
and two trustees. All central property and funds are
vested in the Central Committee. The Central Executive
Committee is appointed from the members constituting the 5
Central Committee; the treasurer, National chairman and
General Secretary together with five other members con-
stitute the Central Executive Committee, which must meet
once a week, and it exercises the function of the Central
Committee between the meetings of the Central Committee 10
which must meet at least twice a year. In terms of
paragraph 9, Districts may be constituted by the Central
Committee and a District Conference called by the Dis-
trict Committee must be held annually on the basis of one
delegate for every ten members, save that where the men- 15
bership of a District is less than 200, the District Con-
ference shall be a general meeting of all members in the
District. This provision is of importance in considering
the meaning of "a general meeting of the members of a
District". In addition to the Annual Conference or 20
general meeting, a District Committee shall call Confer-
ences or general meetings at regular intervals to be
determined by the District Committee. It is not suggested

in the papers that a District conference was at any stage called during the period under consideration, nor that the general meetings referred to in Kotane's affidavit were general meetings where the membership of the District was less than 200. In paragraph 12, every member must pay dues according to a scale determined by the National Conference, and the Central Committee may impose a national levy on all members. As to discipline, in terms of paragraph 13, the District Committee of the Central Committee may suspend or expel a member for breach of the Constitution or conduct proved to be detrimental to the Party. Such member has the right to appeal against disciplinary measures to the Central Committee and thereafter to the National Conference. The appeals have to be made through the District Committee concerned, which forwards each appeal together with the relevant documents to the Central Committee. Inactive members may be lapsed from membership by the District Committee, and a member who fails to pay dues over a period of over three months, and fails to pay arrears after being personally visited on behalf of the District Committee, may be lapsed from membership.

Alterations to the Constitution are dealt with in paragraph 15. In terms of this paragraph a proposed amendment/...

amendment to the Constitution must be submitted to the Central Committee two months before the National Conference. The Constitution itself may be amended by majority vote at a National Conference. It is conceded that by virtue of this power such Conference can also dissolve the constitution and with it, the Party.

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An examination of this Constitution makes it abundantly clear that the Central Committee had no authority either to pass the resolution of the 7th May, or to dissolve the Communist Party on the 20th June. It is purely what may be described as an executive body subordinate to the National Conference; and its functions are specifically to translate into action the policy and decisions of the National Conference. There is no suggestion in the written Constitution that the Central Committee has any wider authority than is set out in the Constitution. Certainly there is no warrant for the proposition that it has an over-riding authority entitling it, if need be, to dissolve the Communist Party. It is simply a body born of the Constitution with powers limited to those either expressly or by implication set out therein.

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The Constitution in issue bears a strong resemblance to the written Constitution of a Political Party/...

Party which came under the scrutiny of the Court of
Appeal in Wilken vs. Brebner and Others (1935 A.D.175).

In that case it is true that the issue was whether at
a National Congress the minority were bound by the
decision of the majority in Congress. That is not the 5
case here, for it is clear that whatever the reason or
reasons may be, no National Conference either ordinary
or special, for the calling of which there is provision
in the Constitution, was summoned. The Appellate
Division, however, dealt in considerable detail with 10
the Constitution then in issue, and made it clear that
the body corresponding to the Central Committee of the
Comunist Party is no more than an executive body. It
also indicated that the normal procedure in the case of
a body with a written Constitution for the dissolution 15
of that body is to be found in the Constitution. It
was not called upon to discuss what may be described as
the abnormal - in the contrasted sense - procedure for
dissolution based upon unanimous individual decision to
dissolve. 20

In the Wilken case (supra) the Constitution
of the party provided for its amendment by a Congress of
the Party, but there was no provision in the Constitution
for the dissolution thereof. In fact, the Congress had
by/...

by majority passed a resolution to unite with another political Party to form a new Party. It was held by the majority judgment that the decision was validly taken. Beyers, J.A., dissented on the ground that there should have been a unanimous vote in favour of the proposed course of conduct. In his judgment, Wessels C.J., outlined the procedure and machinery of the Political Party in language which appears to be eminently applicable to the position disclosed in these papers. He said that the nature of a voluntary organisation, assuming it to be such, was most important in deciding upon the rights of an individual member. A Political Party being formed for the purpose of furthering the political objects of a Party can only attain its purpose by constituting a party machine, which would necessarily contain various agents or bodies which would spread the propaganda of the Party and would in turn be controlled by a supreme council. The presumption thus would be that a political party, being cumbersome in its nature, intends that the opinion of the individual member should be subservient to the bodies appointed to carry out the objects of the Party. Where the Political Party has a Constitution, that Constitution must be interpreted to give effect to the object of the Party, and by that Constitution/...

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stitution the rights of the individual members of the Party must be determined. Having dealt with the various provisions of the Constitution, he goes on to say:

"The central committee is the supreme executive power for ordinary purposes. It controls the branch and other committees; it calls the yearly Congress together and is entrusted with carrying out the resolutions of the Congress. The yearly Congress is the highest power in the party; it may even dismiss the central committee if it thinks that the latter has acted contrary to the interests of the party. The Congress has the power (Art. 53) to alter and add to the constitution of the party as it thinks fit. It is therefore quite clear that the members of the party by its very constitution have entrusted to the yearly Congress the fullest power of dealing in the interests of the party. The Congress is, as it were, the parliament of the party. It would therefore seem, prima facie, that the members of the party have entrusted the carrying out of the objects of the party to the various committees and have given to the yearly Congress the plenary power to alter the constitution of the party to suit the varying conditions of the country. There is no provision by which the individual member can make his voice heard. As I have said, there is no referendum."

Goudsmit, Windscheid, Modderdam, Dernburg en Savigny.

After having cited these authorities, he concludes:

"My gevoele is dat meeste skrywers
dink eenstemmigheid op belangrike of
ingrypende punte, soos byvoorbeeld ont- 5
binding, is nodig. Ek kan my nie
voorstel dat die lede, wat die Spesiale
Kongres bele het, nog die Spesiale Kon-
gres self, ooit bedoel het dat gewigtige
beginsels ooit deur 'n meerderheid van 10
die Kongres of van die lede van die
party verander sou kon word nie. Enige
ander sienswyse kom feitlik neer op die
verbeuring van die regte van 'n minder-
heid, ook wat betref die bate en naam 15
van die party."

The judgments in the case just referred to are unanimous,
as I read the case, in the view that members, having
subordinated themselves on the basis of contract to the
machinery created by themselves, are bound thereby, 20
whether by a vote taken unanimously at a congress called
for that purpose or by a majority. I find nothing in
the case to suggest, where amendment of the Constitution
is provided for in the Constitution, that individuals
of such a party throughout the country can merely of 25
their own volition individually and independently amend
such Constitution by silent and unexpressed consent;
and that therefore, if the power to amend includes the
power/...

power to dissolve, they may effect this result in the same way. Mr. Duncan's argument was that although the National Conference was, in terms of the Constitution, the arbiter of the Party's destiny, individual members scattered far and wide throughout the country could, without recourse to the provisions and requirements of the Constitution, validly dissolve the Party, without calling any meeting, and that consent to such a course must be inferred on the part of every member who has failed to object to such a proposal. I am by no means prepared to accede to so wide a proposition.

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There was considerable discussion as to the precise legal category under which a political organisation such as the Communist Party of South Africa falls. Mr. Duncan contended that it was merely a voluntary organisation, the members of which are bound by contract only, while Mr. van Wyk argued, referring to the Constitution, that it was a universitas. I find it, as the Court of Appeal did in Wilken vs. Brebner (supra) unnecessary to answer this question, being prepared to assume for the purposes of this case that it is a voluntary association, the members of which are bound by contract to one another, the contract being reflected by and enshrined in the Constitution. The legal position/...

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position of such an Organisation is discussed in the
Jockey Club case, 1942 A.D.340, and also in the earlier
Crisp case, 1930 A.D.225, and requires no further dis-
cussion in the present case.

It is explicitly provided in the present 5
Constitution - as in the Constitution dealt with in
Wilken vs. Brebner - that an amendment of the Constitu-
tion can only be effected in the particular way provided
by the Constitution. And it is implicit in - and
indeed so expressed in - the judgment in that case that 10
the abrogation of the Constitution and the dissolution
of the Party is effected in the same way; for the
power to amend includes the power to dissolve, which
indeed Mr. Duncan concedes. Had there been in the
Constitution, by which each contracting member was 15
bound, no power to amend the Constitution or dissolve
the Party, the applicant's contention that the consensus
of all the members to dissolve would have the effect of
dissolution, would merit serious consideration: see
Solomon vs. The Alfred Lodge, 1917 C.P.D. 181, 184, 186 20
per Kotze, J. In such a case the consent of all the
members would be necessary for an amendment of the
Constitution and a fortiori for the dissolution of the
Party itself. The members are banded together by
contract/...

contract based on consensus; and they are bound only on the terms to which they have agreed. Such terms can therefore only be varied by the consent of all the parties to the contract: i.e. all the members. See

Halsbury Hailsham Vol. 4 par. 898, P.489; and Josephson vs. Witwatersrand Hebrew Association, 1945 W.L.D., 102.

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The Constitution of a voluntary organisation is the charter of the organisation, expressing and regulating the rights and obligations of each member thereof.

In relation to that organisation, to the constitution of which he has subscribed, he is no longer a free and unfettered individual: he is a member bound by his agreement and to that extent has surrendered his private individuality. Were it not so the constitution would

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not be worth the paper it was written on; and the proceedings and activities of the organisation would be attended by embarrassment and chaos. In the case of a club, perhaps the most usual form of voluntary organisation, its dissolution - where not otherwise provided for - is by resolution of a general meeting of the members of the club called for this purpose. See

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Wertheimer: Clubs: 5th Edition, 27; and Halsbury, Hailsham 4 para. 969. I have found no authority - and

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none has been suggested - to justify a submission that

a/...

a voluntary organisation with proprietary rights and liabilities, and with a constitution agreed to by its members, can simply disregard the provisions of that constitution and by the silent and unexpressed individual concurrence of members dissolve into thin air.

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I have already indicated that in my view the affidavits supporting the application relied upon the authority of the Central Committee to dissolve the Communist Party. In his argument Mr. Duncan conceded that it had no such power. He argued, however, that the Communist Party could be dissolved in three ways, viz. by:

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- (a) a decision of the National Conference;
- (b) by the agreement of all members; or
- (c) by resolutions of the Districts who appoint the delegates to the National Conference.

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As to (a) he admitted that no meeting, special or otherwise, of the National Conference had been called. No reference, indeed, to a National Conference is made in the affidavits, and no explanation is given as to why a special National Conference could not have been called to decide the Party's fate. It is clear that the Constitution provides for its amendment by the National Conference/...

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Conference alone. It was suggested in argument that the time factor may have been an insuperable obstacle because an amendment of the Constitution, let alone a resolution to dissolve the Party, would require two months' notice. This point, however, is not made in the affidavits at all. As it turns out, although the Central Committee may not have realised it, there would have been time to have called such a Conference and to have taken such a decision prior to the promulgation of the Act on the 17th July. With regard to submission (c) he contended that the Constitution could be amended and dissolved - and with it the Party - by resolution of the Districts who appoint the delegates to the National Conference. In argument he conceded that this submission could not be substantiated. If such amendment or dissolution is to take the place of consent of all the members, then the power to amend the Constitution in this manner must be found in the Constitution itself. From the Constitution itself, however, it is quite clear that the right to amend is vested in the National Conference only. Not only is this stated in clear terms in paragraphs 6(a) and 15 of the Constitution but there is also a further indication that no such alternative method was contemplated. Delegates to the National Conference/...

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Conference are elected by the District Conferences and paragraph 6(e) of the Constitution provides that such delegates "may not be held bound by a mandate on any question but are free to vote as responsible members of the National Conference." In other words the Constitution specifically takes away from the District Conferences any power to amend the Constitution and this power the delegates are to exercise untrammelled by mandate from the District Conferences, i.e. after full and free discussion the delegates are to exercise their own discretion and not that of their District Conferences when deciding upon any amendment. It follows therefore that it is immaterial what the District Conferences may decide upon any particular amendment. In passing I wish to point out that the subservient position of the District Conferences can also be seen from paragraph 7(i) of the Constitution which provides that the Central Committee "shall be entitled to have the power in the event of disciplinary action being taken against the whole District, to seize all property and funds of that District." I come, therefore, to the conclusion that, in terms of the Constitution, the Party could not be dissolved by any resolutions of the District Conferences. Mr. Duncan was left, therefore/...

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therefore, with the second submission (b) already referred to, that the Constitution which, by contract between the members, controlled the Party, could be entirely disregarded and that the Communist Party could validly in law be dissolved by the agreement, even if unexpressed, of all members of that Party without calling in aid any of the procedure created by them for the government of the affairs of the Party.

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Upon the assumption that this argument would be sound in law, he submits that the evidence positively establishes that before the 17th July, 1950, all members of the Communist Party had either expressly or by conduct, agreed to the dissolution, and that therefore by that date the Party had ceased to exist and could not after that date have been an unlawful organisation, whereas before that date it had been a perfectly legal organisation.

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He bases his argument on five steps taken at various stages:

(a) on the 7th May a unanimous resolution was passed by the Central Committee to this effect;

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(b) by the 5th June the Bill had become

the Suppression of Communism Bill, and
between/...

between the 7th and the 22nd June the resolution was expressly adopted unanimously by a General Meeting of every District;

(c) on the 20th June a public statement was made and given wide publicity;

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(d) no members resigned after the Bill became law, for each would have been guilty of an offence had the Party not been dissolved; and

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(e) all steps were taken to wind up the affairs of the Organisation and it was completely wound up.

He summarised his submission by contending that the only inference is that every member had consented prior to the 17th July, nearly a month after the publicity attendant upon the decision to dissolve. He concedes that if there had been but one dissentient or one non-consenting member, this submission would have been ill-founded; but he submits that as no single such person has on the papers come forward, the Court is bound to draw the inference that every member of the Party had prior to the 17th July either expressly or by conduct consented to the dissolution of the Party. He expressly disclaims any/...

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any reliance upon the legal principles of waiver, estoppel or acquiescence, principles which Mr. van Wyk, for respondents, contended could have no application on the facts alleged. Mr. Duncan indeed conceded that there was no duty upon any member to speak; from which it would follow in the ordinary course that from silence no inference of consent could be drawn. Nonetheless, he contended that on the facts alleged by the applicant no other inference than unanimous consent on the part of each and every member to dissolution of the Party could be drawn. On his argument and in the light of the concessions made by him, his submission is of a most far-reaching character, and requires a close examination of all the facts upon which it is based.

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The first obstacle to a positive decision in his favour is that the first respondent categorically refuses to admit the correctness of the factual allegations made as to the dissolution. To a great extent if indeed not completely, by reason of the terms of the rule nisi, he has been prevented at the inception of his investigations from carrying them to finality, as indeed has been forcibly emphasised by Mr. van Wyk.

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In these circumstances it would be extremely difficult for this Court to hold at this stage that the applicant has/...

has proved his allegations of fact: for only upon such proof can he base his contention that the Communist Party had in fact been dissolved by, at the latest, the 17th July, 1950.

Apart from this real difficulty in the way 5
of a decision in applicant's favour, and assuming for the purposes of his submission the correctness of the facts deposed to, do these facts establish that the only inference which this Court can draw is that each and every member of the Communist Party of South Africa 10
had expressly or by conduct consented to the dissolution of the Communist Party? It was argued that "by conduct" meant that as there had been no protest or resignation by any member after (a) the news of the dissolution had been published to the world on 20th June, and (b) 15
meetings of the various Districts - seven in all - had unanimously agreed to the dissolution, the absence of such protest or resignation indicated a positive consent by every member to the dissolution of the Party. In view of the fact that Mr. Duncan concedes that there 20
was no duty on any member to speak or to indicate "yea" or "nay", I find it difficult to appreciate the argument that such member has by conduct, i.e. by failure to protest or resign, consented to the dissolution of the/...

the Party. It may well be that a resolution initially invalid, and indeed ultra vires,, could be validated by the subsequent unanimous agreement of all the members of the Party. That indeed is the substance of Mr. Duncan's submission. How is this submission borne out by the facts deposed to, assuming them to be correct despite first respondent's refusal to admit such correctness?

In view of the heavy onus resting on applicant to show that every individual member had consented to the dissolution of the Communist Party, can it be said that the allegations of the applicant should be held to have successfully discharged it? There is no indication in the papers of the total membership of the Communist Party; nor of the membership in each of its seven Districts. There is also no indication as to how many members attended each of the District General Meetings, or whether the results of these meetings were circulated amongst all members to apprise absentees of the result thereof. Indeed, except that it is alleged that these meetings were "duly convened", there is no indication to show how this was done, whether by letter, circular or advertisement or that each individual member was given notice of these meetings, cf. Solomon's case (supra)/...

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(supra). Such information is particularly important when it is conceded that the failure of only one member to consent would destroy the foundation of the submission made. Some members may well have been overseas; (one indeed was but was alleged to have resigned before leaving in 1949); others may have been ill or away from their District when the meetings were held; others may have decided to nail their colours to the mast; many may not have heard of the public statement despite its widespread publication. When pressed on these points requiring clarification - the more so as all records were alleged to have been destroyed prior to the dissolution of the Party - Counsel for applicant could only reply negatively. He conceded that only a small minority of members of each District might have attended these meetings, but contended that in view of the widespread nature of the publication of the dissolution, all absentees whether they had been notified or not of the meetings, must be taken to have consented thereto. He cited the Cape Indian Congress case, 1948 (2) S.A.L.R. 609, 610), where the Court of Appeal held that where it could not be proved whether 27 members out of a large and specifically enumerated number had attended a particular meeting, it was a fair inference on a balance of probabilities/...

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