**AFRICAN NATIONAL CONGRESS**

**NATIONAL DISCIPLINARY COMMITTEE Case No: /2011**

In the matter of:

**AFRICAN NATIONAL CONGRESS Complainant**

**NATIONAL OFFICIALS**

and

**SINDISO MAGAQA Respondent**

 **FINDING**

The respondent, comrade Sindiso Magaqa, was charged with misconduct for contravening Rule 25.5 (o) of the ANC Constitution.

The disciplinary hearing took place on 11 September 2011 and closing argument was presented on 13 September 2011.

**A. Preliminary point**

At the outset the Chief National Presenter sought to amend the charge in two respects:-

1. The deletion of the words, “in a pre-meditated manner”; and

2. The substitution of the words, “the ANC Youth League issued, in your

 name, as Secretary General of that structure” with the words “ you issued

 in the name of the ANC Youth League.”

The respondent’s representative objected to the amendments.

After consideration, the NDC upheld the objection of the respondent to

the first amendment but allowed the second amendment.

**B. Amended charge sheet**

The amended charge sheet reads as follows:-

That you are guilty of contravening Rule 25.5(o) of the Constitution of the

African National Congress by, in a pre-meditated manner, prejudicing the

integrity or repute of the organisation, by making derogatory remarks about

an NEC member thereby creating division within the ranks or membership

of the ANC.

IN THAT:

On August 2, 2011 you issued in the name of the ANC Youth League a

derogatory statement regarding Comrade Malusi Gigaba, an NEC member

and former President of the Youth League stating:

*“The ANC Youth League is relieved that at last Mr Gigaba who never held a political view on any issue before, now has courage to speak about nationalisation of mines, although with wrong approach, vigour and very wrong information. We hope his suddenly found courage to speak about nationalisation of mines is not inspired by the American Chamber of Commerce, which he unfortunately was addressing.”*

*“... grand standing and pleasing imperialists undermines people’s integrity and further degenerates the little political respect comrades have. The ANC Youth League will soon request a meeting with Mr Gigaba, who was clearly not speaking on behalf of the ANC when addressing the Americans, to take him through basics on nationalisation of mines and its relationship to future investments and employment creation. We will do so because we do want not to lose patience with people who can still learn a lot.”*

**C. Plea**

The respondent pleaded not guilty and did not disclose the basis of his defence.

**D. Formal admissions**

The respondent admitted that:-

1. He was a member of the ANC in good standing;

2. He was aware of the ANC Constitution and Code of Conduct; and

3. On 2 August 2011 he issued the statement containing the utterances

 alleged in the Charge (Annexure SM1). This document will be hereinafter

 be referred to as “the statement”.

**E. Bundle of documents**

The Chief National Presenter submitted the following additional documents for admission as evidence:

Annexure SM1 – Youth League statement dated 2 August 2011

Annexure SM2 - Extract from the statement of the ANC National Executive

 Committee: 12-13 March 2010

Annexure SM3 - Minister Malusi Gigaba’s interview with Chris Barron

 Sunday Times 7 August 2011

Annexure SM4 - ANC Statement on the ANCYL National Conference

Annexure SM5 - Report of the 3rd National General Council (2010);

 Economic Transformation

Annexure SM6 – Extract from the Rise and Fall of Bantu Holomisa

These documents were admitted with no objection by the respondent.

The respondent presented a document entitled, “Nationalisation debate

damaging – Gigaba.” It was admitted in evidence and marked as Annexure

SM7 with no objection from the complainant.

**F. Case for the complainant**

The complainant did not call any witnesses and closed its case after submitting Annexures SM1 to SM6.

**G. Onus**

1. After the respondent admitted that he had issued the statement on 2

 August 2011, the onus was upon him to provide an explanation for his

 conduct.

2. The complainant had to prove, on a balance of probabilities, that the

 respondent contravened Rule 25.5(o) of the ANC Constitution.

**H. Evidence for the respondent**

In opening its case the respondent’s representative informed the NDC that he was not sure whether the respondent would be called as a witness.

The first witness called on behalf the respondent was **comrade Floyd Shivambu.**

A summary of his evidence is as follows:-

1. He was the spokesperson of the ANC Youth League.

2. After interacting with the Youth League leadership, he typed the

 statement.

3. The statement was a response to an article in the Business

 Day which reported on a speech delivered by comrade Malusi

 Gigaba to the American Chamber of Commerce on 1 August

 2011 where he said that the present debate in SA around nationalisation

 was damaging.

4. A commentary on the speech, which presumably was published on

 Tuesday 2 August 2011 in the Business Day, stated that

 “Government is aware of the harm the reckless debate on nationalisation

 is doing to SA’s image but will not implement unconstitutional measures,

 said Minister of Public Enterprises Malusi Gigaba on Monday.”

5. There were also news reports on radio and television that the ANC Youth

 League was reckless in the way it dealt with the nationalisation of mines

 debate.

6. The characterisation of the nationalisation debate as reckless triggered a

 response from the Youth League.

7. After consulting widely, the NEC members of ANC Youth League

 prepared the contents of the statement and it was released to the media

 by the respondent in his capacity as Secretary General of the ANC Youth

 League.

8. The understanding was that the Youth League must respond and seek an

 urgent meeting about the issues that were of concern to it.

9. Comrade Shivambu explained that the statement was issued by the

 respondent, because the Youth League had learnt the practice from the

 ANC that a statement issued by the Secretary General carried more

 weight than a statement issued by a spokesperson.

10. Comrade Gigaba called the witness and said that the issue of a meeting

 should be taken forward.

11. The statement was not intended to sow division in the ANC and the

 witness was not aware of any divisions that had been created because

 there was an agreement that a meeting would take place and the media

 focused on the meeting.

Under cross-examination

1. When asked about the contents of Annexure SM7, the witness responded

 it was a news report in Business Day about what comrade Gigaba had

 said at the American Chamber of Commerce about nationalisation and

 was not a statement issued by comrade Gigaba.

2. When asked whether the contents of SM7 was not the Business Day’s

 version, the witness responded that, upon inquiry, the Department of

 Public Enterprises confirmed that comrade Gigaba had said that there

 was recklessness in the debate. So the Youth League had it on good

 authority about what comrade Gigaba had said.

3. When asked whether the remarks were part of comrade Gigaba’s speech,

 the witness responded that they were not but were said in response to

 questions raised.

4. When asked whether there was any reference to the Youth League or the

 ANC, the witness responded that it was common knowledge that the

 nationalisation debate was the debate of the ANC.

5. When asked whether he made any attempt to verify the statement with

 comrade Gigaba, the witness responded that he did not personally call

 him but spoke to a person in comrade Gigaba’s office who confirmed that

 comrade Gigaba did say that.

6. When asked whether he considered the statement to be derogatory, his

 response was that he did not think it was.

7. When asked what the need was for issuing the statement, his response

 was that the Youth League issued the statement because it was in the

 public discourse that a former president of the Youth League had

 characterised the debate on the nationalisation of mines as damaging and

 reckless and as being pursued by ideologists. It had to be clarified at

 the public level that that was not the case.

8. When asked what the purpose was for seeking a meeting with comrade

 Gigaba, the witness replied that the purpose was to clarify why

 comrade Gigaba had said that the debate on nationalisation was reckless.

 Furthermore, as a former president of the ANC Youth League, the League

 expected a more collaborative approach from him when dealing with the

 issue of nationalisation.

The second witness was **comrade Vuyiswa Tulelo**. A summary of her evidence is as follows:-

1. She was the former Secretary General of the ANC Youth League.

2. Comrade Vuyiswa clarified the difference between statements issued by

 spokespersons and those issued by the Secretary General. Statements by

 spokespersons would convey regular information whereas a statement by

 a Secretary General would be authoritative and set out matters of

 organisational imperative with clarity. It mirrored the practice followed by

 the ANC.

3. The practice was that the SG would go through a statement before issuing

 it. But if it was a decision of a meeting, the statement would probably go

 out without the SG even seeing it.

4. It was not necessary for the Secretary General to have written the

 statement.

5. The Secretary General acts on behalf of the organisation.

6. Comrade Gigaba was the longest serving President of the Youth League

 and served the youth capably.

Under cross-examination

1. When asked whether the SG should accept responsibility for the

 statement, she responded that he should because it was regarded as a

 statement issued by the SG.

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2. When asked whether the contents of the statement issued by the

 respondent was derogatory, she responded that the statement did create

 a bit of discomfort but that question should be directed to the Youth

 League.

On re-examination, the witness testified that:-

1. The Youth League was prone to hot debates.

2. If the Youth League felt strongly about something, it had a way of

 expressing that passion in its statements.

3. She did not think that the Youth League could tell comrade Gigaba

 with a straight face that he did not hold a political opinion.

The respondent did not testify and closed his case.

**J. Evaluation by NDC**

 1. Although the respondent did not disclose the basis of his defence and did

 not testify in his defence, it became apparent from the line of

 examination of his witnesses, that the respondent’s defence was that

 he was acting as a representative or as an agent of the ANC Youth

 League and in an official capacity and, consequently, could not be held

 personally liable.

2. In deciding whether the respondent’s defence could be sustained, the

 NDC considered:-

 2.1 The responsibility of the Secretary General of the Youth League;

 2.2 The responsibility of persons acting in a representative capacity;

 2.3 Whether the contents of the statement was lawful and reasonable or

 derogatory and in breach of the ANC’s Code of Conduct;

 2.4 The contents of SM7;

 2.5 Assessment of the statement and SM7;

 2.6 Other defences raised by the respondent; and

 2.7 The argument advanced that the respondent acted in a representative

 capacity and not in a personal capacity.

***2.1 The responsibility of the SG of the Youth League***

1. In terms of the Constitution of the ANC Youth League, the respondent is

 the Secretary General and, as such, the Chief Administrative Officer of

 the ANC Youth League.

2. He is responsible for the overall functioning of the ANC Youth League

 and, *inter alia*, for liaising with other organisations and institutions

 nationally and internationally.

3. By virtue of his office, he is an ex-officio member of the NEC of the ANC.

***2.2 The responsibility of persons acting in a representative capacity***

1. As a general rule, a representative, Secretary General, agent or employee

 of an organisation is obliged:-

 1.1 to carry out a lawful and reasonable instruction of that organisation;

 and

 1.2 exercise reasonable skill and care in executing the instruction.

2. The converse is that if the instruction is unlawful (i.e. contrary to law or,

 as in this case, the ANC Constitution) or unreasonable (i.e. could expose

 the issuer of the statement or the organisation to litigation or, as in this

 case, disciplinary action), the agent, representative or Secretary General

 would have a valid excuse for disobeying such instruction and not issuing

 the statement.

***2.3 Whether the contents of the statement was lawful and reasonable***

 ***or derogatory and in breach of the ANC’s Code of Conduct***

1. Comrade Shivambu testified that the trigger for issuing the statement

 was the characterisation of the nationalisation debate as reckless which

 the Business Day commentary attributed to comrade Gigaba.

2. The statement consists of four paragraphs and approximately 300 words.

3. The NDC is of the view that the following parts of the statement have no

 relevance to nationalisation and are directed at comrade Gigaba

 personally:-

 “...at last, Mr Gigaba who never held a political view on any issue

 before, now has courage to speak about nationalisation”.

 “This is unlike some people who led the ANC YL for many years and

 never had any impact, nor influenced any policy shift, including on

 youth development. The only thing known about some people is

 government flowers, which have nothing to do with the National

 Democratic Revolution and the Freedom Charter”.

“Grand standing and pleasing imperialists undermines people’s

 integrity and further degenerates the little political respect comrades

 have”.

 “Mr Gigaba who was clearly not speaking on behalf of the ANC when

 addressing the Americans”

 “We will do so because we do not want to loose (sic) patience with

 people who can still learn a lot.”

4. The text quoted above is more than a hundred words and constitutes

 more than one third of the text of the statement.

***2.4 The contents of SM7***

In this document it is reported that comrade Gigaba:-

1. Expressed the government’s view that the nationalisation debate was

 causing harm to South Africa’s image.

2. Expressed concern about reckless debate.

3. Mentioned that the ANC had established a task team to investigate

 nationalisation and deliver a report by the end of the year.

4. Said that the ANC would engage relevant parties and make a decision

 that was in the best interest of the mining sector.

5. Said that, until then, the ANC-led government would not implement any

 unconstitutional measures.

***2.5 Assessment of the Statement and SM7***

1. Taking these two documents together, the NDC is of the view that

 comrade Gigaba articulated a responsible and rational approach to the

 issue of nationalisation in line with ANC and government policy and

 explained what the NEC decision on the issue was. Nowhere in the speech

 and commentary did comrade Gigaba refer to the ANC Youth League nor

 was there any reference which could enable a reasonable reader to

 conclude that he was referring to the ANC Youth League or that he was

 attacking the Youth League for the position it had adopted on

 nationalisation.

2. Comrade Shivambu testified, that the characterisation of the debate as

 reckless, and not any reference to the ANC Youth League, triggered a

 response from the ANC Youth League.

3. Comrade Shivambu also testified that the original speech by Comrade

 Gigaba did not refer to the Youth League or characterise the debate as

 reckless.

4. When comparing the contents of comrade Gigaba’s input on the subject

 of nationalisation with the response of the ANC Youth League, it is

 apparent that the response of the Youth League was emotionally

 charged. Moreover, the Youth League directed its anger at comrade

 Gigaba personally and in derogatory terms.

5. The NDC finds that the statement is derogatory and potentially

 defamatory; it constitutes an unwarranted and unjustified attack on the

 person of comrade Gigaba as a Minister and NEC member; and is

 unreasonable and contrary to the ANC Constitution.

***2.6 Other defences raised by the respondent***

 ***2.6.1 Respondent’s argument that the Minister was criticized in***

 ***his capacity as a Minister of State and not an a member of***

 ***the ANC or NEC of the ANC***

The NDC finds the distinction drawn to be superficial for the following reasons:-

1. It is common knowledge that the ANC is the ruling party;

2. Members of the ANC have been deployed to take up positions in

 government.

3. The ANC Constitution and Code of Conduct also seek to regulate the

 conduct of public representatives, of which comrade Gigaba is one.

4. Although comrade Gigaba has been deployed as a Minister of State, his

 primary accountability is still to the ANC.

5. The performance of comrade Gigaba as a Minister of State is inextricably

 and causally linked to his membership of the ANC.

6. In terms of the ANC’s policy of deployment, comrade Gigaba can be

 recalled or re-deployed at the instance of the ANC.

 ***2.6.2 Respondent’s argument that there was no evidence of***

 ***premeditation***

1. The NDC is of the view that the words, “in a predetermined manner”

 as appears in the Charge, do not place any additional onus upon the

 complainant. In any event, it emerged from the evidence of

 comrade Shivambu that the Youth League collectively participated in the

 formulation of the statement and it was widely discussed in the

 organisation before it was issued. In the view of the NDC this evidence

 confirms that the statement was pre-conceived and consequently

 premeditated.

 ***2.6.3 Respondent’s argument that there is no rule prohibiting***

 ***derogatory statements***

1. It is self-evident from a reading of Rule 25.5 that the ANC seeks to

 maintain discipline in the organisation by deeming specified acts and

 utterances of its members to constitute misconduct.

***2.7 The argument advanced that the respondent acted in a***

 ***representative capacity and not in a personal capacity***

1. At the outset of the proceedings, the respondent admitted that he was a

 member of the ANC and was aware of the ANC Constitution and Code of

 Conduct contained in the Constitution.

2. On reading the contents of the statement, the respondent, as a leader of

 the ANC Youth League holding a responsible position, would have seen

 that the statement contained an unwarranted and unjustified attack on

 the person of comrade Gigaba and, because of its potentially defamatory

 nature, could have exposed the Youth League, the ANC and himself to a

 law suit.

3. The respondent would have also realised that the issuing of the statement

 in his name could have rendered him liable to be charged for

 misconduct in terms of the ANC Constitution.

4. The respondent also had a duty to exercise reasonable skill and care

 when issuing the statement.

5. Given the inflammatory and derogatory nature of the contents the

 statement, the respondent should have sought advice prior to issuing the

 statement.

6. Although one of the functions of the office of Secretary General of the

 ANC Youth League is to issue official statements of the NEC of the Youth

 League, there was no obligation on the respondent to issue the statement

 which, in the NDC’s view, was derogatory and unreasonable.

7. The respondent had a choice and could have refused to issue the

 statement in his name and would have had a valid reason for not doing

 so.

8. The publication of the statement in the media brought the ANC into

 disrepute and had the likely effect of creating division within the ranks of

 the ANC because both the respondent and comrade Gigaba are members

 of the NEC of the ANC, which is an authoritative structure in the ANC.

9. After the respondent admitted that he had issued the statement, he was

 obliged to provide an explanation to the NDC.

10. The respondent’s failure to do so meant that there was no version before

 the NDC to consider his defence that he was acting as a representative

 of the ANC Youth League.

11. Neither comrades Shivambu nor Tulelo were able to testify whether the

 respondent was party to the formulation of the statement or that he had

 read the statement before issue. They were also not able to say whether

 the statement was issued in the respondent’s name without him having

 had sight of it which comrade Tulelo testified was the practice in the

 Youth League.

**K. Finding by the NDC**

After considering the above factors, the NDC finds as follows:-

1. Comrade Shivambu contradicted himself in a material respect regarding

 a meeting that had been arranged between comrade Gigaba and the

 Youth League.

2. Comrade Shivambu’s evidence about having confirmed what comrade

 Gigaba had said at the American Chamber of Commerce is hearsay.

3. The contents of the statement was derogatory and potentially defamatory

 in nature and constituted an unwarranted and unjustified attack on the

 person of comrade Gigaba;

4. As such, there was no obligation on the respondent to issue the

 statement in his official capacity as Secretary General of the ANC Youth

 League.

5. The respondent would have had a valid reason or excuse not to issue the

 statement.

6. The fact that the respondent elected to issue the statement in his name

 through his office as Secretary General shows that he acted with no

 consideration of the consequences of his action.

7. By electing to issue the statement, with full knowledge that its contents

 was derogatory of comrade Gigaba, the respondent’s conduct was

 unreasonable and in conflict with the ANC Constitution.

8. The respondent, by conduct, associated himself with the contents of

 the statement and consequently attracted personal liability. Moreover,

 comrade Shivambu testified that the statement was prepared by the

 leadership of the ANC Youth League, of which the respondent is part.

9. Even if the statement was issued in the name of the respondent without

 his knowledge (which is not the respondent’s case), there is no evidence

 before the NDC that the respondent had taken any immediate corrective

 action to absolve himself from liability after establishing that the

 statement had been issued.

10. It is self-evident that the issuing of the statement by the respondent:-

 10.1 was prejudicial to the integrity and repute of the ANC and its

 personnel (comrade Gigaba);

 10.2 created or had the likely effect of creating division within the ranks

 of the ANC and in the ANC’s relationship with the ANC Youth

 League since the respondent, comrade Gigaba and the National

 Executive Committee members of the Youth League are all members

 of the ANC;

 10.3 undermined the effectiveness of the ANC as an organisation in that

 the respondent’s misconduct undermined comrade Gigaba’s

 position as a Minister, deployed by the ANC, within the country and

 internationally; and

 10.4 impeded comrade Gigaba’s activities in his capacity as a Minister of

 State and, by implication, the activities of the ANC as an

 organisation.

11. On the evidence, the NDC finds the respondent personally liable for

 misconduct.

12. The NDC is of the view that the complainant has proved the misconduct

 of the respondent on a balance of probabilities.

13. The NDC is satisfied that the causal link between the respondent’s

 misconduct and the act of misconduct contemplated in Rule

 25.5(o) of the ANC Constitution has been established.

14. For the reasons set out above, the NDC is of the view that the defence of

 the respondent that he issued the statement in his official capacity as

 Secretary General and as a representative or agent of the ANC Youth

 League and was therefore not personally liable, cannot be sustained.

15. Accordingly, the respondent is found guilty as charged.

16. On 6th November 2011 the respondent’s representative specifically

 requested the NDC to decide whether the disciplinary proceedings

 were validly instituted in accordance with the ANC Constitution.

 17. The argument was considered in the disciplinary inquiry of comrade

 Julius Malema and the finding in that case viz. “the respondent’s

 argument that the “National Officials” does not exist and that, if it

 existed, it could only refer and not institute disciplinary proceedings is

 rejected” is incorporated in this finding.

**L. The impact of ANC disciplinary proceedings on membership of the**

 **ANC Youth League**

1. Pursuant to Article 11.2 of Schedule A of the Constitution of the ANC

 Youth League, this ruling is applicable to the respondent’s

 membership of the ANC Youth League.

**M. Sanction**

***M1. Factors taken into account for the purpose of sanctioning***

* The seriousness of the charge;
* the presence of aggravating factors;
* any previous finding against the respondents;
* the presence of mitigating factors;
* the concept that the sanction must take into consideration the interest of the ANC, the respondent and society at large;
* the concept of a graduated approach to sanctioning; and
* the sanction must fit the offence

***M2. Consideration of an appropriate sanction***

1. The Ministry of Public Enterprises is a critical portfolio in South Africa’s

 quest to attract foreign and local investment for infrastructure

 development and job creation. The respondent, as a member of the NEC

 of the ANC should have been familiar with programmes of the ANC and

 government in this regard and should have realised the consequences of

 his action and its impact on society.

2. The unwarranted attack on the person of comrade Gigaba belittled and

 had the effect of potentially defaming him as a person. At an operational

 level the attack painted a picture of someone who was ineffective, out to

 appease the forces of imperialism and as one who did not enjoy the

 confidence and political support of his comrades in the ANC. In the NDC’s

 view, this picture would have seriously lowered comrade Gigaba’s esteem

 detracted from his mandated duties as Minister of Public Enterprises and

 impacted negatively on the ANC.

3. In the current economic climate internationally, the securing of foreign

 direct investment has become extremely challenging and competitive. The

 NDC is of the view that the respondent’s action has severely prejudiced

 the ANC, the government and the community it serves, including a

 possible negative effect on investment in South Africa.

4. The NDC has taken cognisance of the fact that the respondent’s conduct

 not only attracted liability to himself but also created uncertainty and

 attracted risk to the country. International and local investors would be

 reluctant to enter into any long term investment arrangements with a

 Minister of Public Enterprises who apparently did not enjoy the support

 of the Youth League of the ANC - who could be seen as possible future

 leaders.

5. In any event any attack on a leader of the ANC and NEC member by a

 Youth League leader who is also a member of the NEC, constitutes an act

 of ill-discipline and has the effect of creating divisions in the organisation.

6. For these reasons the NDC considers the offence to be of a very serious

 nature.

7. The respondent did not testify. Consequently, the NDC has no basis to

 establish his version and consider any mitigating factors.

8. The NDC has taken into account the finding of guilt against the

 respondent on a charge of contravening Rules 25.5(q) and 25.5(o) (which

 finding was handed down today) and decided not to invoke the

 suspension in that matter for the purpose of determining an appropriate

 sanction in this case.

 9. Having weighed and considered these factors, the NDC imposes

 the following sanction:

 9.1 The respondent’s membership is suspended for a period of 18

 (eighteen) months.

 9.2 The sanction imposed in 9.1 above shall be suspended for a period of

 3 (years) and will be implemented if the respondent is found guilty of

 contravening Rule 25.5(o) of the ANC Constitution within the said

 period.

 9.3 Pursuant to Article 11.2 of Schedule A of the Constitution of the

 ANC Youth League, this ruling is applicable to the respondent’s

 membership of the ANC Youth League.

 9.4 The respondent shall make a public apology to comrade Malusi

 Gigaba. Failure to do this within 5 (five) days after the conclusion of

 this process will result in Clause 9.1 taking immediate effect.

 The respondent shall be entitled to appeal to the NDCA within 14 days.

Dated at Johannesburg this 10th day of November 2011