**AFRICAN NATIONAL CONGRESS**

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

In the matter of:

**AFRICAN NATIONAL CONGRESS Complainant**

**NATIONAL OFFICIALS**

and

**FLOYD SHIVAMBU Respondent**

 **FINDING**

The disciplinary hearing of comrade Floyd Shivambu took place on 13 September 2011 and argument was presented on 6 November 2011.

**A. The charges**

**Charge One**

That you are guilty of contravening Rule 25.5 (o) aa, bb, cc and dd of the ANC Constitution by prejudicing the integrity or repute of the organization, its personnel or its operational capacity by impeding the activities of the organization, creating divisions within its ranks or membership, doing any other act which undermines its effectiveness as an organization:

In that:

1. On or about 12 July 2011 you deliberately and repeatedly told a

 journalist “*Fuck you*” and “*fuck off*”, thereby causing great harm to the

 integrity and reputation of the ANC:

2. On August 02, 2011, you issued a press statement in which, inter alia,

 the following is stated:

*“The ANC Youth League does not believe that our position on Botswana and the approach is inconsistent with ANC policy outlook (sic);” that*

*“If there is anything inconsistent with ANC policy directives, it is leaders of the ANC who associated with imperialist controlled political parties like MDC in Zimbabwe and BDP in Botswana;” further that*

*“… the ANC Youth League takes a practical programme of liberating the people of Botswana from imperialist dominance; ” further that,*

*“… the government of Botswana had openly embraced imperialism…”*

And finally that

*“The resolution of the ANCYL NEC on the Botswana Command team stands until there is discussion with ANC Constitutional structures on what should be the approach to the Botswana question.”*

These careless, negligent or reckless pronouncements and utterances were a deviation of established and ongoing ANC policy as derived from the Freedom Charter and further developed in ANC policy documents, including ‘Ready to Govern’ the “ANC’s Strategy and Tactics” and the resolutions of the 50th, 51st and 52nd Conferences of the ANC and had the effect of embarrassing and bringing the organization into disrepute within and beyond the borders of South Africa.

**Charge Two**

That you are guilty of contravening Rule 25.5(i) of the Constitution of the African National Congress by behaving in such a way as to provoke serious divisions or a breakdown of unity in the organization;

In that:

You issued a press statement on August 02, 2011 in which an attempt is made to drive a wedge between the spokesperson of the ANC and the ANC Officials and which also contained the following statement:

*“If there is anything inconsistent with ANC policy directives, it is leaders of the ANC who associated with imperialist-controlled parties like the MDC in Zimbabwe and the BDP in Botswana. The ANC Youth League is concerned that strange ideological trends and political relations are being established for convenience, and this has the potential to undermine the integrity of the ANC as a National Liberation Movement.”*

thereby undermining the leadership of the ANC and provoking serious divisions within the leadership of the ANC and consequently, the entire organization.

**B. Plea**

The respondent pleaded not guilty to all the charges and elected not to disclose the basis of his defence.

**C. Formal admissions**

The respondent admitted that he was a paid up member of the ANC in good standing and was aware of the ANC Constitution and its Code of Conduct.

**D. Admission of documents**

The complainant handed in the following documents and there was no objection from the respondent:

Annexure FS1 – transcript of telephonic discussion

Annexure FS2 – article entitled “Floyd Shivambu swears with bad language”

Annexure FS3 – article entitled “Shivambu defiant after swearing journalist”

Annexure FS4 – Youth League statement on Botswana Command Team

**E. Charge One**

The respondent was charged for two separate acts of misconduct in terms of Rule 25.5 (o) of the ANC Constitution.

**F. Evidence for the complainant**

**F1 First act of misconduct**

The first witness to testify was **comrade Baleka Mbete**, national chairperson of the ANC. A summary of her evidence is as follows:-

1. She was at a press conference held by a delegation that she had led to

 south Sudan when she was asked about the comments made by the

 respondent to a journalist.

2. She condemned the use of such language, said it was unacceptable and

 that it was not good for the image of the organization.

3. She could not remember when the ANC had condoned such language and

 even if it did, it did not mean that the ANC had no right to correct itself.

4. As the respondent was a spokesperson for the ANC Youth League for a

 long time, she expected him to be conscious of the responsibility he

 carried in terms of the image of the organisation.

5. She was not aware whether the respondent had taken any corrective

 action to undo the impairment or prejudice to the image of the ANC.

6. She said that every member of the ANC was expected to understand the

 ANC, its values, its practices, its culture and its policies and a member

 was not expected to do anything in public that would be detrimental to

 the positive image and standing of the ANC.

Under cross-examination

1. When asked if she was aware of the context in which the respondent used

 vulgar language when she made her comment, her response was that she

 was not but went on to say that her response would have been the same.

2. When asked if she was aware that the respondent was being badgered by

 the journalist and whether the context mattered when commenting, the

 witness responded that context mattered insofar as you have to explain

 something or convey something to that person but you do not have to use

 swear words to make a point.

3. When asked whether it mattered that the respondent was in the privacy

 of his own home when he was called, the witness responded that there

 are things one is allowed to do in the privacy of their homes but

 spokespersons were different from ordinary members and had to be on

 their guard at all times because of the nature of their duties.

4. When asked whether she was aware that the ANCYL had taken action

 against the respondent, her response was that she was not aware.

5. When asked what her response would if she was aware that the Youth

 League had taken action against the respondent, the witness stated that

 it would be a good thing and hoped that it would never happen again.

6. When asked for details of previous occasions when the respondent

 committed the same or similar offence, she referred to an incident when

 the ANC had to pay compensation, under threat of being sued, to a third

 party on the respondent’s behalf for the commission of a similar offence.

The second witness was **comrade Jackson Mthembu**. He said that:-

1. Foul language was not tolerable and, as a spokesperson, he would not

 have used those words.

2. There are times when you snap and lose it. In such circumstances

 one should walk away rather than responding as a human being

 because it might impact on the organisation you represent.

3. He said that if he snapped, he would rather put his phone down but

 he would not snap by insulting someone because you carry the

 values of the organisation.

**F2 Second act of misconduct**

**Witness Comrade Baleka Mbete**

1. Comrade Mbete testified that the ANC has a policy which promotes peace
 and peaceful co-existence with the people of Africa, in particular its

 neighbours.

2. The 52nd Conference of the ANC in 2007 expressed itself on this matter.

 The resolution also dealt with parties that do not have the same vision as

 the ANC and the ANC’s role in such a case was to promote friendship

 based on common interest.

3. After being referred to Annexure E2, she said that comrade Jackson

 Mthembu correctly reflected the ANC’s view on Botswana.

4. She referred to paragraphs 35 to 38 in Annexure F9 and confirmed that it

 was the resolution adopted by the ANC on Party-to-Party relations at its

 52nd Congress in Polokwane.

5. The ANC Youth League statement was an affront to ANC policy and was

 divisive because it conveyed the notion that there were ANC leaders who

 took different positions from others. She added that it would have a

 negative impact on the repute and integrity of the ANC and would create

 confusion and concern among the people.

6. Rule 7.4 of the ANC Constitution defined the scope of activities of the

 ANC Youth League. Such activities should be based on ANC policy and

 any statement had to be within the context of ANC policy and its

 constitution.

7. There was ample room in the ANC, its procedures and in the way it

 conducts its business for any member who has a different view to express

 that view internally and try hard to persuade the organization. But until

 the next policy conference, a member is obliged to follow existing policy.

 The moment one expresses a different view he or she is violating ANC

 policy.

8. The Youth League statement created division in the minds of people about

 the leadership of the ANC and would have a negative impact on the

 integrity and repute of the ANC.

9. The issue was not within the domain of any spokesperson of the Youth

 League to pronounce on publicly.

10. She was referred to Annexure D4 which was the apology from the Youth

 League for its statement on Botswana. Her comment was that it was

 inaccurate because, by its conduct, the ANC Youth League has been

 seen by the whole world as defining itself outside ANC policy. She added

 that the statements of the Youth League and the respondent disrupted

 current engagements of the ANC on a whole range of matters.

11. It was not within the realm of any person, the Youth League, the ANC or

 even the South African government to unilaterally decide to do things for

 people in another country.

12. Members of the ANC Youth League sat on different structures of the

 ANC which dealt with policy formulation.

Under cross-examination

1. When asked whether there would be a difference between someone who

 honestly believed that his or her interpretation of ANC policy was correct

 and someone who openly flouted ANC policy, the witness responded that

 there would be a difference but it was unfortunate that the respondent

 continued after being informed officially of the ANC’s stance.

2. When asked whether the government had not acted differently to ANC

 policy on international relations, her response was that the ANC’s policy

 stance should not be conflated with that of the South African

 government.

3. When asked whether the Youth League could not pronounce on foreign

 policy, her response was that it was not the place of the Youth League to

 pronounce on international relations. The Youth League could lobby

 publicly but must be aware of the sensitivities and nuances and must

 engage with the ANC internally. She added that the Youth League can

 develop policy within the confines of its expectation as set out in the ANC

 Constitution.

4. It was put to the witness that it was legitimate to believe that many held

 the view that the ANC Youth League should not confine itself because it

 was autonomous and therefore independent. Her response was that the

 Youth League was not independent.

5. It was put to the witness that there was room for policy differences

 between the constitutions of the ANC Youth League and the ANC. She

 denied this and said that the Youth League was repeatedly told not to

 pronounce on issues that were not ANC policy. She added that in terms of

 the ANC Constitution the Youth League was supposed to focus on youth

 issues and not with international issues or to pronounce on relations

 with parties across the border of South Africa. That would be a grossly

 different kind of situation.

6. A statement made by comrade Duma Nokwe which suggested that the

 Youth League should not be confined to matters concerning the youth

 was put to the witness and her response was that the timing of the

 statement was a factor to be considered.

7. It was put to the witness that the ANC had sent a team to Sudan to

 assist a party, the SPLA, which was not the ruling party and that the ANC

 did the same in the DRC and Western Sahara. Comrade Mbete’s response

 was that those were ANC decisions and the support partly assisted the

 SPLA to come to power. She added that there was a difference between

 those situations and what we are dealing with in this case.

8. When asked on what basis the ANC had given financial assistance to the

 BNF in Botswana, her response was that paragraph 38 of the ANC

 resolution on Party-to-Party relations allowed the ANC to work with

 parties in areas of common interest although these parties did not share

 the same vision as the ANC. She added that ANC policy is informed by

 developments and how we analyse them and not just by history.

9. When asked whether the ANC Constitution prevented the Youth League

 from engaging in foreign policy issues, her response was that the ANC

 encouraged the Youth League to have relations with youth movements of

 different organizations because it was ANC policy but the League should

 express its foreign policy outlook through the International Relations

 subcommittee of the ANC.

10. It was put to the witness that by converse logic the Youth League was

 not obliged to support parties which it considered not to be progressive.

 The witness responded that not to support parties which the Youth

 League considered to be reactionary and to publicly stand opposed to

 ANC policy on how to deal with parties which did not share the same

 vision as the ANC were entirely different matters. She added that where

 the Youth League expressed views publicly which were at variance with

 ANC policy and how the ANC perceived the situation, such conduct was

 ill-disciplined and brought the ANC into disrepute.

11. Comrade Baleka stated that the Youth League’s interaction with

 organisations in other countries did not extend to Heads of State and

 ruling parties as the Youth League did in the case of Zimbabwe. In that

 instance, the Youth League’s conduct was not only problematic but it

 impeded work which the ANC was doing in Zimbabwe.

12. It was put to the witness that there was a difference between ‘policy’ and

 ‘objective’ and that the Youth League was entitled to develop its own

 policies. Comrade Mbete responded that the policies of the Youth

 League had to be within the confines of ANC policy and the ANC

 Constitution.

13. It was put to the witness that the respondent’s utterances were in line

 with the resolution of the Youth League taken on 31 July 2011. Her

 response was that the NEC of the ANC Youth League had a duty to

 provide leadership and not be led and bound by resolutions.

14. It was put to the witness that in terms of the principle of organizational

 discipline, the respondent was not in a position to contradict a decision

 of the Youth League. Comrade Mbete responded that the respondent

 should have checked with the rules of the ANC and ensure that he was

 keeping in line with ANC policy.

15. When asked why the ANC decided to discipline the respondent when

 the Youth League had apologised and when there is a culture of

 correcting within the ANC, her response was that apologies are not

 always convincing.

**Witness Comrade Jackson Mthembu**

1. He testified that the ANC was forced to respond to the statement by the

 Youth League after inquiries from the media.

2. The ANC did not have a policy on regime change in Botswana.

3. The Youth League statement damaged the ANC brand. The ANC issued a

 statement to do damage control because the South African embassy in

 Botswana was inundated with queries.

4. The Youth League statement was taken seriously in Botswana and not

 well received.

5. The Secretary General of the ANC had to issue a statement after the

 Youth League had taken issue with the statement that he had issued.

Under cross-examination

1. When asked what he found offensive with the statement issued by the

 Youth League, his response was that it would amount to destabilizing a

 sitting government.

2. When asked whether there was anything wrong with a member of the

 ANC acting on a resolution, his response was that the ANC has a

 programme of action on foreign relations which it pursued as an

 organization.

3. When asked whether there was anything wrong with the Youth

 League taking an aggressive approach, his response was that the Youth

 League can be militant within the norms of ANC policy.

4. It was put to the witness that the respondent honestly believed that he

 was acting within ANC policy and that the belief was reasonable. The

 witness referred to paragraph 38 of the ANC resolution on Party-to-Party

 relations and said that the Youth League should have come to the ANC

 for guidance and that it did not do so.

5. It was put to the witness that the ANC does not have a policy of not

 supporting opposition parties. The response of the witness was that the

 ANC does not have a policy of working to remove sitting parties.

6. When asked whether he was aware that the ANC had sent a team to

 Sudan to assist an opposition party, his response was that he was aware

 but did not know the details.

7. It was put to the witness that organizational discipline demanded that a

 spokesperson was obliged to articulate a decision of the organization

 irrespective of his or her personal views. Comrade Mthembu’e response

 was that he was familiar with ANC policy and had always agreed with

 positions taken by the ANC. In performing his task as a spokesperson, he

 did not take leave of his membership of the ANC.

8. When asked to explain his comment about “harbouring criminals’, his

 response was that his comments were made in the context that South

 Africa has always been seen as a good neighbour. As the ruling party the

 ANC should not be seen to be giving refuge to those who wished to

 destabilize or effect regime change.

The complainant closed its case.

The respondent, **comrade Floyd Shivambu**, testified that:-

1. He was a member of the NEC of the ANC Youth League and was re-

 elected in June 2011 to serve a second term.

**First act of misconduct**

1. The journalist wanted information about a personal issue concerning

 comrade Julius Malema and requested comrade Malema’s telephone

 number.

2. His phone rang continuously. He answered it on the fourth ring and

 realised that it was the same journalist. It was a 021 number. He replied

 that he had no comment because it had nothing to do with politics and

 the organisation and put the phone down.

3. After about 8 or 9 calls from the same 021 number, he answered his

 phone.

4. On this occasion the journalist spoke in a calmer voice.

5. He was thinking about the way the journalist spoke to him earlier when

 he made the unfortunate remarks as stated in the Charge.

6. He could not switch off his phone because he had to take other calls.

7. He regarded his remarks to be unfortunate and wrong.

8. He was offended because the journalist called him a fool.

9. It was the first time that he was spoken to by a journalist in that manner.

10. He has been the Youth League spokesperson for 3 years. During that

 time there were instances when he was shouted at and all sorts of

 insults were hurled at him. He was even told by a journalist on ne

 occasion that “you Youth League people are corrupt”. He did not react to

 these comments and statements.

11. He informed the SG of the Youth League the next day after the incident

 and told the SG that he considered the incident to be unfortunate.

12. He said that he was not aware at the time that the conversation was

 being recorded. If he was aware, he would not have responded in the

 way he did.

13. On the instruction of the Youth League officials he issued a statement

 distancing the Youth League from his conduct.

14. On 14th July 2011 the NEC of the Youth League reprimanded him.

15. He did not deny the incident referred to by comrade Mbete which related

 to a previous similar incident.

16. He thought that he was engaging in a private discussion.

Cross-examination

1. When asked why he did not inform the National Presenter after being

 charged that he was already reprimanded by the Youth League, his

 response was that he was not sure of the legalities.

2. When asked whether he was justifying his action, he replied that he did

 not want to justify what happened.

3. When asked why he did not plead guilty, his response was that he

 pleaded not guilty because “the disciplinary proceeding would provide a

 platform for this matter to be laid to rest”

4. When asked about the reservations expressed in the Youth League

 apology, his response was that it was the statement of the

 Youth League.

5. When asked whether he apologised publicly his response was that he did

 not publicly admit that he was wrong.

**Second act of misconduct**

1. After the 24th National Congress in June, the NEC of the ANC Youth

 League met between 29 and 31 July 2011.

2. A statement was subsequently prepared on the resolutions adopted

 and read out by the Secretary General, comrade Sindiso Magaqa, at a

 press conference on 31 July 2011 (Annexure E1).

3. The statement contained the views of the ANC Youth League collective,

 meaning the NEC of the ANC Youth League.

4. Although the ANC Youth League, and not the respondent, issued the

 statement to the media (Annexure E1), the respondent’s name and

 contact details were inserted at the end of the press release.

5. On 1 August 2011, in response to the Youth League’s media release,

 the ANC issued a statement, annexure E2, in which it rejected and

 publicly rebuked the Youth League for its pronouncements pertaining to

 “regime change” in Botswana and its criticism of the African Union (AU)

 and the Southern African Development Community (SADC).

6. Comrade Shivambu responded to the statement issued by the ANC after

 he received a call from Youth League officials in the Northern Cape who

 informed him that the ANC statement issued by its spokesperson,

 comrade Jackson Mthembu, was not ANC policy.

7. In his response (Annexure E3), the respondent emphatically disagreed

 with the approach adopted by comrade Jackson Mthembu on the

 Botswana question and expressed disappointment with the manner in

 which comrade Jackson Mthembu had handled the matter.

8. He said that the Youth League’s approach on Botswana was “innocent”

 and there was no attempt to destabilize that country.

9. He was still looking for the ANC’s policy on Botswana which the Youth

 League was alleged to have contravened.

10. He was not aware of any serious divisions caused in ANC ranks by the

 Youth League’s statement.

11. Several comrades called him to say that the Youth League had finally

 spoken on Botswana and all opposition parties in Botswana welcomed

 the gesture from the ANC Youth League to assist.

12. He had established from the ANC that the BNF was an ally of the ANC.

13. He “honestly believed” that the resolution of the ANC Youth League was

 part of ANC policy.

Under cross-examination:

1. When asked what the purpose of the resolution was, he responded that

 the idea was to get the BNF to work with other opposition parties.

2. When asked why the Youth League had adopted the resolution, his

 response was that it was mandated by the Youth League conference.

3. When asked whether he was aware of the ANC’s relationship with the

 ruling party in Botswana, his response was that the current Botswana

 ruling party was averse to the ANC in the past.

4. When asked why the Youth League adopted this course of action, the

 respondent replied that the *modus operandi* of the Youth League was

 that if its utterances exceeded the boundaries on any issue, the Youth

 League would withdraw and ask the ANC for guidance and to educate it.

5. When asked why the Youth League did not approach the ANC before

 issuing the statement, his response was that it seemed that the ANC

 leadership did not have the time to provide guidance to the Youth League

 and added that the ANC Youth League has the right historically and now

 to push the boundaries of ANC policies.

6. When asked about the ANC’s policy position on imperialism, his response

 was that he regarded the ANC as an anti-imperialist movement.

7. When he was shown the conference resolutions of the 52nd ANC

 Conference on Party-to-Party relations and asked to explain his evidence

 that the ANC does not have a policy on Botswana, his response was that

 the Youth League’ decision was inspired by a range of factors including

 past and recent resolutions.

8. When asked whether the Youth League had referred its resolution on

 Botswana to the International Relations subcommittee of the ANC, his

 response was that he was not aware.

9. When asked about the Youth League’s view on Botswana, his response

 was that the ANC Youth League’s view was that the current government

 in Botswana was controlled by imperialists.

10. When asked why the Youth League apologised about the resolution

 taken by the Youth League on Botswana, his response was that the

 letter of apology was issued not to cause public confusion in the public

 discourse and that the purpose of withdrawing the Youth League

 statement was to create a conducive environment to be educated and e

 given policy directives by the ANC leadership. The decision to apologise

 to the ANC was first taken by the Officials and secondly by the

 Executives of the ANC Youth League.

11. When asked whether the ANC Youth League considered itself bound by

 ANC policy, he responded most certainly and added that the Youth

 League honestly believed and thought that its statement on Botswana

 was within ANC policy.

12. When asked about the policy making processes in the ANC, comrade

 Shivambu agreed with comrade Mbete that whilst the Youth League

 could interact and engage with other parties, including through its

 international desk, such interaction and engagement should not be in

 conflict with ANC policy.

To avoid the need to call **comrade Vuyiswa Tulelo** as a witness, the Chief National Presenter informed the NDC that the complainant accepted that the respondent was reprimanded by the Youth League for the first act of misconduct.

Respondent closed his case.

**G. Onus of proof**

1. The onus was on the respondent to provide an explanation for his

 utterances which, on a balance of probabilities, was reasonably possibly

 true.

2. The onus was on the complaint to prove, on a balance of probabilities,

 that the utterances in the Charges constituted misconduct and

 contravened the ANC’s Code of Conduct.

**H. Respondent’s argument that the disciplinary proceedings were not**

 **validly instituted in accordance with the ANC Constitution**

1. 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.

2. 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, by agreement between the parties.

3.The remaining arguments raised in sections B and C of the submissions

 made on behalf of comrades Julius Malema and the respondent, which

 were considered and concluded in the Finding on comrade Julius

 Malema, are incorporated herein, by agreement between the parties.

**J. Issues to be determined by the NDC**

**J1. First act of misconduct**

1. On 6 November 2011 the respondent raised the following arguments:-

1.1 That the incident took place on 9th July 2011 and not on 12 July 2011

 as alleged.

1.2 That comrade Mbete conceded that in certain contexts the ANC would

 not take steps against people that have used swear words and has not

 taken steps.

1.3 That the evidence of the respondent was undisputed.

1.4 That the respondent was provoked;

1.5 That the evidence was illegally obtained; and

1.6 That the respondent could not be sanctioned twice for the same offence

 – the defence of double jeopardy

**J2. Second act of misconduct**

The respondent did not disclose the basis of his defence as part of the plea proceedings. However, with regard to the second act of misconduct and from the evidence given, the NDC is of the view that the following issues have to be considered to determine the innocence or guilt of the respondent.

1. What is the relationship between the ANC and the ANC Youth League?

2. Does the ANC have a policy on Party-to-Party relations?

3. Is Botswana included in the ANC resolution on Party-to-Party relations?

4. Did the Youth League contravene the ANC’s policy on Party-to-

 Party relations?

5. Did the respondent issue the statement in his capacity as a

 representative of the ANC Youth League or is he personally liable?

6. If the respondent is personally liable, whether such conduct constitutes a

 contravention of Rule 25.5 (o).

7. Whether such contravention prejudices the integrity or repute of the ANC,

 its personnel, or its operational capacity by:-

 aa. Impeding the activities of the ANC; or

 bb. Creating divisions within its ranks or membership; or

 cc. Doing any other act, which undermines the effectiveness of the ANC

 as an organization.

8. The defences raised by the respondent that:-

8.1 None of the elements of the offence have been established;

8.2 The National Presenter failed to discharge the onus that the respondent

 issued the statement; and

8.3 The statement on Botswana was the collective view of the ANC Youth

 League leadership

**K. Evaluation by the NDC**

**K1. First act of misconduct**

***1. Respondent’s argument that the incident took place on 9th July***

 ***2011 and not on 12 July 2011 as alleged***

1. The Charge alleges that the offence was committed on or about 12 July

 2011.

2. The respondent admitted that he uttered the words complained of by the

 complainant and that the utterances were made on 9 July 2011.

3. In the circumstances the NDC is of the view that the date of the offence

 alleged in the Charge was sufficiently close to the date of the actual

 commission of the offence as testified to by the respondent and that the

 respondent was not prejudiced by the approximate date alleged in the

 Charge.

***2. Respondent’s argument that comrade Mbete conceded that in***

 ***certain contexts the ANC would not take steps against people that***

 ***have used swear words and has not taken steps***

1. Comrade Mbete’s response to this submission was that she could not

 remember any incident where such behaviour was condoned but if the

 ANC did condone such behaviour, it had the right to correct itself.

2. Consequently, this argument is rejected.

***3. Respondent’s argument that the evidence of the respondent was***

 ***undisputed***

1. Based on the evidence the NDC is of the view that the respondent was

 inconsistent and, in part, untruthful.

2. Consequently, the argument advanced by the respondent is

 rejected.

***4. Respondent’s argument that he was provoked***

1. On the respondent’s own evidence, the trigger for uttering the profanities

 was that the journalist had called him a fool.

2. When compared with the respondent’s previous encounters with

 journalists which taxed his patience, particularly being told on one

 occasion that “you Youth League people are corrupt”, the NDC is of the

 view that the respondent’s response was, in the circumstances, not

 justified.

3. Moreover, on respondent’s own evidence he uttered the profanities after

 about 8 or 9 telephone calls from the journalist whose number he

 recognised and who, at the time, spoke in a calmer voice.

4. Based on the evidence, the defence of provocation is rejected.

***5. Respondent’s argument that the evidence was illegally obtained***

1. The incident of the respondent’s conduct was published in the media

 soon after it happened.

2. The charge against the respondent was preferred some weeks later.

3. The transcript of the taped conversation was not used to charge the

 respondent, nor was it used to find him guilty or used to obtain evidence

 to secure the guilt of the respondent.

4. The respondent admitted that he uttered the profanities which he

 considered to be unfortunate and wrong.

5. The fairness of the inquiry and the administration of justice have not

 been affected by the evidence of the taped conversation.

6. Consequently, the NDC is of the view that the respondent was not

 prejudiced and his right to privacy in terms of section 35(5) of the

 Constitution Act was not violated.

***6. Respondent’s argument that he could not be sanctioned twice for***

 ***the same offence - the defence of double jeopardy***

1. The respondent was represented at the disciplinary inquiry by

 experienced and senior legal practitioners.

2. The defence of double jeopardy was not raised as a special plea in the

 proceedings. The respondent’s reason for not doing so was that he was

 not sure of the legalities. That may be so. But he was legally represented.

3. The Youth League Constitution considers offences which damage the

 integrity of the organisation to be within the scope of offences which are

 considered to be grave, serious and a violation of discipline, all of which

 would warrant a disciplinary inquiry by the Youth League.

4. It is common cause that the Youth League did not convene a disciplinary

 inquiry but reprimanded the respondent and directed him to publish an

 apology from the Youth League. The respondent himself did not publicly

 apologise.

5. In the circumstances, the reprimand could be considered in mitigation of

 sanction.

6. The sanction of reprimand was not the outcome of a formal disciplinary

 inquiry by the Youth League which would have entitled the respondent to

 raise a plea of *autrefois convict* based on double jeopardy and which, if

 successful, would have precluded the NDC from hearing the matter.

7. Oral evidence that the respondent was sanctioned would have been

 insufficient to sustain a defence of double jeopardy.

8. Consequently, this argument is rejected.

**K2. Second act of misconduct**

The NDC considered the following issues:-

***1. What is the relationship between the ANC and the ANC Youth***

 ***League?***

1.1 The respondent admitted that he was a member of the ANC.

1.2 Comrade Mbete testified that in terms of Rule 7.4 of the ANC

 Constitution, the Youth League functioned as an autonomous body

 within the overall structure of the ANC, of which it was an integral part,

 with its own constitution, rules, and regulations, provided that these

 shall not be in conflict with the Constitution and policies of the ANC.

1.3 The definition of “autonomous” in the ANC constitution confers on

 the ANC Youth League the freedom to operate independently, next to

 and in addition to ANC structures and within the framework of the

 Constitution and policies of the ANC.

1.4 The NDC is of the view that Rule 7.4, read with the definition of

 autonomous in the ANC Constitution, defines the constitutional

 relationship between the ANC and the ANC Youth League and that the

 operative word is “operate” and not “independently” in the definition of

 “autonomous”.

1.5 In the view of the NDC, the ANC Youth League has operational

 independence but is not independent of the ANC.

1.6 By virtue of this relationship, the Youth League is obliged to operate

 within the ANC Constitution and policy.

***2. Does the ANC have a policy on Party-to-Party relations?***

2.1 The NDC accepted the evidence of comrade Mbete that the ANC has a

 policy which promotes peace and peaceful co-existence with

 neighbours and the people of Africa and that the 52nd Conference of

 the ANC in 2007 expressed itself on this matter when it adopted a

 resolution on Party-to-Party relations.

2.2 Paragraph 38 of the resolution, covered relations with

 parties that were not the ruling party.

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***3. Is Botswana included in the ANC resolution on Party-to-Party***

 ***Relations?***

 Having regard to the evidence of comrade Mbete and the ANC

 resolution on Party-to-Party relations, the NDC is of the view that

 Botswana is included in the ANC resolution on Party-to-Party relations.

***4. Did the Youth League contravene the ANC’s policy on Party-to-Party***

 ***relations?***

 Having regard to the fact that the ANC has a policy on Party-to-Party

 relations and the evidence of comrade Mbete, the NDC is of the

 view that the Youth League contravened the ANC’s policy on Party-to-

 Party relations when it authorized the issue of the statement marked

 Annexure E3.

**5*.*** ***Did the respondent issue the statement in his capacity as a***

 ***representative of the ANC Youth League or is he personally liable?***

 5.1 The respondent maintained that he issued the statement (Annexure

 E3) on behalf of the ANC Youth League as its spokesperson and

 representative. He also testified that comrade Mthembu had

 incorrectly stated ANC policy.

 5.2 In relation to the ANC and ANC policy, the statement (Annexure E3)

 raised the following contentious issues:-

 5.2.1 it disagreed with the ANC’s spokesperson’s approach and, by

 implication, the ANC’s approach on Botswana;

 5.2.2 it made reference to a practical programme of the Youth League

 to liberate the people of Botswana from imperialist dominance;

 5.2.3 it referred to the BDP as a potential security threat to the entire

 African continent;

 5.2.4 it expressed the belief that the ANC Youth League’s position on

 Botswana was not inconsistent with ANC policy;

 5.2.5 it stated that the ANC was acting outside its own policy

 directives by associating with imperialist-controlled political

 parties like the MDC in Zimbabwe and BDP in Botswana;

 5.2.6 it suggested that the ANC was establishing strange ideological

 trends and political relations for purposes of convenience and

 that such conduct had the potential of undermining the

 integrity of the ANC as a national liberation movement;

 5.2.7 it issued a threat viz. that the ANC Youth League resolution

 would stand until there was discussion with the ANC on what

 the approach to the Botswana question should be; and

 5.2.8 it stated that the ANC Youth League had canvassed and

 obtained the support of continental and world youth

 formations for its position on Botswana.

5.3 The respondent’s letter triggered a response from the Secretary General

 of the ANC who clarified and restated the ANC’s international relations

 policy.

5.4 As the spokesperson of the Youth League, the respondent should or

 ought to have been aware of ANC policy on International Relations.

5.5 If the respondent was not sure of the ANC’s policy on Botswana, he

 should have sought guidance from the ANC.

5.6 The respondent testified that even at the time of the hearing, he could

 not locate the ANC’s policy on Botswana.

5.7 In carrying out his function as a spokesperson, the respondent had a

 duty to exercise reasonable skill and care. This means that as the

 spokesperson, the respondent should have taken steps, before issuing

 the Youth League statement (Annexure E3), to ensure that the

 statement was lawful (i.e. not in contravention of any ANC policy) and

 reasonable (i.e. it would not expose him to the risk of being disciplined

 for contravening the ANC Constitution).

5.8 If the respondent had exercised reasonable care, he would have realized

 that the issuing of the statement could expose him to risk and attract

 personal liability.

5.9 The NDC is of the view that the contents of Annexure E3 is so

 unreasonable that the respondent should have refused to issue it on

 behalf of the Youth League and would have had a valid reason or excuse

 for not doing so.

5.10 The fact that the respondent did not seek advice prior to issuing the

 statement supports the contention in the Charge that he acted

 recklessly with no consideration of the consequences of his action. In

 the view of the NDC, this conclusion is reinforced by the respondent’s

 own evidence that he still cannot locate the ANC’s policy on Botswana.

5.11 The NDC’s view is that a spokesperson, by association, takes

 responsibility and assumes ownership of any statement or comment he

 or she issues on behalf of an organization.

5.12 The NDC is of the view that the respondent, by conduct, associated

 himself with the contents of the statement and is therefore personally

 liable for any consequences that could ensue from his act of issuing

 the statement.

5.13 Consequently, the respondent’s defence that he acted in a

 representative capacity cannot be sustained.

5.14 By conduct, the respondent attracted personal liability.

***6. If personally liable, whether the respondent’s conduct constitutes a***

 ***contravention of Rule 25.5 (o)?***

 6.1 Comrade Mbete said that the statement of comrade Floyd Shivambu

 (annexure E3) was an affront to ANC policy and was divisive because

 it conveyed the notion that there are ANC leaders who take different

 positions from others. She added that it would have a negative impact

 on the repute and integrity of the ANC and would create confusion

 and concern among the people.

 6.2 With regard to the support offered by the Youth League to the people

 of Botswana, comrade Mbete testified that it was not within the realm

 of any ANC member, the ANC Youth League or even the South African

 government to decide to do things for people in another country.

 6.3 Based on the evidence of comrade Mbete, the NDC is of the view that

 the conduct of the respondent constituted a contravention of Rule

 25.5 (o) of the ANC Constitution.

***7. Whether such contravention prejudice the integrity or repute of the***

 ***organization, its personnel, or its operational capacity by:-***

 ***aa. Impeding the activities of the ANC; or***

 ***bb. Creating divisions within its ranks or membership; or***

 ***cc. Doing any other act, which undermines the effectiveness of the***

 ***ANC as an organization.***

 7.1 Comrade Mbete testified that the statement was an affront to ANC

 policy and was divisive.

 7.2 The statement contained an attack on ANC leaders and accused

 them of associating with imperialist-controlled parties.

 7.3 The innuendo in the concern of the Youth League “that strange

 ideological trends and political relations are being established for

 convenience” suggests that ANC leaders are deviating from stated

 ANC policy on international relations and that such conduct is

 unusual and secretive. Such a conclusion detracts from the integrity

 of the ANC.

 7.4The suspicion created by the statement would make it more difficult

 for the ANC to function in its Party-to-Party Relations. In short, it

 projected the ANC as an organization that cannot be trusted.

 7.5 In light of the negative impact created by the respondent’s statement,

 the NDC is of the view that the respondent’s conduct prejudiced the

 integrity and repute of the ANC, created division within its ranks and

 impeded and reduced its effectiveness in achieving its foreign policy

 objectives in the region and in the continent.

 7.6 Consequently, the NDC is satisfied that the causal link between the

 misconduct of the respondent and the act of misconduct

 contemplated in Rule 25.5 (o) has been established.

***8. The defences raised by the respondent that:-***

***8.1 None of the elements of the offence have been established;***

***8.2 The National Presenter failed to discharge the onus that the***

 ***respondent issued the statement; and***

***8.3 The statement on Botswana was the collective view of the ANC***

 ***Youth League leadership***

8.1 The respondent argued that the provocation of serious divisions or a

 breakdown of unity were elements of the offence and were not proved

 nor linked to the ANC Youth League statement.

8.2 In the NDC’s view the words, “as to provoke” in Rule 25.5 (i) of the ANC

 Constitution do not require proof of actual serious divisions and a

 breakdown of unity but, on a balance of probabilities, had the potential

 to create division and breakdown of unity.

8.3 The Rule seeks to deem any act or utterance which could potentially

 cause serious divisions and a breakdown of unity to be an act of

 misconduct as contemplated in the said Rule.

8.4 In this regard the NDC accepts the interpretation of the Complainant

 that there is no requirement to prove actual division or breakdown of

 unity.

8.5. The potential prejudice to the ANC has been considered in 7 above.

8.6 The arguments under Clauses 8.2 and 8.3 have been considered above

 and in the disciplinary inquiry of comrade Julius Malema, which is

 incorporated herein.

 **L. Finding by NDC on Charge One**

**L1. First act of misconduct**

1. The respondent admitted swearing at the journalist and the NDC finds

 that the respondent uttered the foul language alleged in the Charge.

2. The respondent’s defence that he was provoked is rejected on the

 following grounds:-

2.1 On the respondent’s own evidence, the trigger for uttering the profanities

 was that the journalist had called him a fool.

2.2 When compared with the respondent’s previous encounters which taxed

 his patience, particularly being told that “you Youth League people are

 corrupt”, the NDC finds that the respondent’s response was, in the

 circumstances, unjustified.

2.3 Moreover, on respondent’s own evidence he uttered the profanities after

 about 8 or 9 telephone calls from the journalist whose number he

 recognised and who, at the time, spoke in a calmer voice.

3. On the respondent’s argument that the evidence was illegally

 obtained, the NDC finds:-

3.1 The transcript of the taped telephone conversation by the journalist was

 not used to charge the respondent, nor was it used to make a finding or

 used to obtain evidence to secure a finding adverse to the respondent.

3.2 The respondent admitted that he uttered the profanities which he

 considered to be unfortunate and wrong and the NDC finds him guilty

 on his admission and not on the evidence of the taped telephone

 conversation.

4. The NDC rejected the respondent’s argument that he could not be

 sanctioned twice for the same offence - the so-called defence of

 double jeopardy, on the following grounds:-

4.1 The defence of double jeopardy was not raised as a special plea in the

 proceedings. The respondent’s reason for not doing so was that he was

 not sure of the legalities. That may be so. But he was legally

 represented.

4.2 The Youth League Constitution considers offences which damage the

 integrity of the organisation to be within the scope of offences which are

 considered to be grave, serious and a violation of discipline, all of which

 would warrant a disciplinary inquiry by the Youth League.

4.3 It is common cause that the Youth League did not convene a

 disciplinary inquiry but reprimanded the respondent.

4.4 The NDC finds that the sanction of reprimand was not the outcome of a

 formal disciplinary inquiry by the Youth League which would have

 entitled the respondent to raise a plea of *autrefois convict* based on

 double jeopardy and which, if successful, would have precluded the

 NDC from hearing the matter.

4.5 Oral evidence that the respondent was sanctioned was insufficient to

 sustain a defence of double jeopardy.

5. The respondent’s use of vulgar language constituted behaviour which is a

 breach of the ANC’s Code of Conduct.

6. The NDC took the view that the media and any other third party, with

 whom the respondent as spokesperson for the Youth League

 communicated with, deserved respect.

7. Irrespective of how frustrated the respondent felt, he owed a duty not to

 bring the ANC into disrepute.

8. Based on his admission, the NDC finds that the respondent is guilty of

 prejudicing the repute of the ANC in contravention of Rule 25.5(o) of the

 ANC Constitution and that the causal link between the misconduct of the

 respondent and the act of misconduct contemplated in Rule 25.5 (o) of

 the ANC Constitution has been established.

**L2. Second act of misconduct**

1.The statement the statement (Annexure E3) raised the following

 contentious issues and was a contravention of ANC policy:-

 1.1 it disagreed with the ANC’s spokesperson’s approach and, by

 implication, the ANC’s approach on Botswana;

 1.2 it made reference to a practical programme of the Youth League

 to liberate the people of Botswana from imperialist dominance;

 1.3 it referred to the BDP as a potential security threat to the entire

 African continent;

 1.4 it expressed the belief that the ANC Youth League’s position on

 Botswana was not inconsistent with ANC policy;

 1.5 it stated that the ANC was acting outside its own policy

 directives by associating with imperialist-controlled political

 parties like the MDC in Zimbabwe and BDP in Botswana;

 1.6 it suggested that the ANC was establishing strange ideological

 trends and political relations for purposes of convenience and

 that such conduct had the potential of undermining the

 integrity of the ANC as a national liberation movement;

 1.7 it issued a threat viz. that the ANC Youth League resolution

 would stand until there was discussion with the ANC on what

 the approach to the Botswana question should be; and

 1.8 it stated that the ANC Youth League had canvassed and

 obtained the support of continental and world youth

 formations for its position on Botswana.

2. The respondent, by conduct, associated himself with the

 contents of the statement of the ANC Youth League (Annexure E3) which

 was unlawful and unreasonable.

3. The respondent’s act of issuing the statement, without due regard for the

 consequences of his action and in circumstances where he was under no

 obligation to issue the statement (Annexure E3), rendered him personally

 liable for misconduct.

4. The NDC is satisfied that the complainant has proved its case on a

 balance of probabilities and that the causal link between the misconduct

 of the respondent and the act of misconduct contemplated in Rule 25.5

 (o) of the ANC Constitution has been established.

5. Consequently, the NDC finds the respondent guilty as charged.

**M. Charge Two**

**M1. Evidence for the complainant**

Both comrades Mbete and Jackson Mthembu testified for the complainant.

In view of its finding on this Charge, the NDC believes it is unnecessary to summarise the evidence of these comrades.

**M2. Evaluation by the NDC**

1. The extent of overlap between Charges 1 and 2 is evident.

2. The NDC notes that the complainant has not sought to amend

 this Charge at any stage of the proceedings and decided to make a

 finding.

3. Consequently, the NDC is of the view that since the respondent has

 already pleaded to this charge, the NDC is obliged to make a finding.

**M3. Finding by NDC on Charge Two**

The respondent is found not guilty on Charge Two.

**N. Impact of the ANC disciplinary proceedings on membership of 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.

2. Full details of this ruling are set out in the disciplinary inquiry finding of

 comrade Julius Malema and are incorporated herein.

**O. Sanction**

***O1. Factors taken into account for the purpose of sanctioning***

* The seriousness of the charge;
* the presence of aggravating factors;
* any previous findings 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

***O2. Consideration of an appropriate sanction***

**O2.1. First act of misconduct**

1. Generally, a spokesperson is the face of any organisation. The NDC is of

 the view that the respondent’s use of vulgar language when dealing with

 third parties brought the ANC into disrepute, is unacceptable and

 constitutes a serious offence.

2. Comrade Mbete testified that she could not remember when the ANC had

 condoned such language and that it was not the first time that the

 respondent had committed such an offence.

3. The respondent’s apology to the Youth League for swearing at the

 journalist was considered as a mitigating factor.

**O2.2. Second act of misconduct**

1. The respondent is a senior member of the ANC Youth League and

 performs the crucial function of communicating and articulating

 decisions of the NEC of the Youth League to members of the ANC Youth

 League and to the public.

2. The NDC is of the view that the respondent, who is currently serving a

 second term as the spokesperson and a leader within the ANC, should

 have known better.

3. The NDC is of the view that the interest of the ANC has been severely

 prejudiced by the misconduct of the respondent. Consequently, the

 organisation’s standing in inter-party and international relations has

 been eroded and the element of trust and the ANC’s standing ,built over

 the years, would take time to heal.

4. As the ANC is the ruling party in government, the NDC has no doubt that

 the respondent’s act of misconduct would have a negative impact on

 international inter-state relations and would be prejudicial to society as a

 whole.

5. The NDC is of the view that a key responsibility of spokespersons of

 structures and organs of the ANC is to disseminate and articulate

 decisions of the movement an organisation with clarity, consistent with

 policies of the ANC.

6. Certainty is important because investors form their opinion about South

 Africa from the statements issued by spokespersons. The respondent’s

 reckless conduct not only attracted liability to himself but also put the

 country at risk.

7. The NDC is mindful of the fact that the ANC Youth League is robust in its

 manner of conducting its affairs and has developed a tendency of

 pushing the boundaries of policy formulation, as the respondent has

 testified, and the ANC would not expect its youth wing to act any

 differently. However, the NDC is of the view that a distinction must be

 made between robust expression and recklessness and ill-discipline in

 expression. It was incumbent upon the respondent, as a senior leader of

 the Youth League, to be mindful of this distinction at all times.

8. The NDC is also of the view that the respondent should have realised

 that states guard their sovereignty jealously and that the ANC had given

 an undertaking in the Freedom Charter, more than sixty years ago, to

 respect this convention.

9. Any message from the Youth League as a structure within the ANC, could

 be perceived by the public at large to be a message representing the views

 of the ANC and, by implication, the government of South Africa.

10. The NDC has noted the arrogance of the respondent and his response to

 the ANC that “the Youth League’s position on Botswana will stand until

 resolved with the ANC” and regards such conduct as an act of defiance

 and ill-discipline. This arrogance and defiance, the NDC notes, is a far

 cry from the manner in which different leaders of the Youth League, over

 the decades, conducted their affairs in attempting to influence ANC

 policy and to contribute to the political and organisational work of the

 ANC and the life of the nation.

11. Once the ANC, through its Headquarters, has pronounced on any

 matter, no structure or member may publicly contradict such

 pronouncement.

12. In the circumstances the NDC considers the two offences for which the

 respondent has been found guilty to be very serious in nature.

***O3. Sanction***

1. Having considered all the above factors, the NDC imposes the following

 sanction in respect of the two acts of misconduct of which the

 respondent has been found guilty:

 1.1 The respondent’s membership is suspended for a period of 3 (three)

 years.

 1.2 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.

 1.3 The respondent shall vacate his position as a member of National

 Executive Committee of the ANC Youth League.

 The respondent has the right to appeal to the NDCA within 14 days.

Dated at Johannesburg this 10th day of November 2011