
GOVERNMENT NOTICE

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

No. R. 159

17 February 2006

TERMS OF REFERENCE OF THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA FOR THE ESTABLISHMENT OF A COMMISSION OF INQUIRY TO CONDUCT AN INVESTIGATION INTO THE ALLEGED ILLICIT ACTIVITIES OF CERTAIN SOUTH AFRICAN COMPANIES OR INDIVIDUALS RELATING TO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME IN IRAQ

The President has in terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, appointed a Commission of Inquiry to conduct an investigation into the alleged illicit activities of certain South African companies or individuals relating to the United Nations Oil-For-Food Programme in Iraq, with the terms of reference set out in the Schedule, and appoint Adv. Michael Donen, S.C., as Chairperson, and Adv. Khehla Chauke (of the Specialised Commercial Crime Unit of the National Prosecuting Authority) and Senior Superintendent Lucy Moleko (of the Serious Economic Crime Unit of the Commercial Crime Unit of the South African Police Services) as additional members of the said Commission.

SCHEDULE

WHEREAS the United Nations ("the UN"), in April 2004, appointed the **Independent Inquiry Committee** ("the IIC") to, among others, collect and examine information relating to the administration and management of the Oil-for-Food Programme of the UN in Iraq ("the Programme"), including allegations of fraud and corruption on the part **of, *inter alia***, any agents, contractors or entities that have entered into contracts with the UN or with Iraq, under the Programme, with a view to determine, among others—

- (a) whether the procedures established by the UN or any of its Councils or Committees for the processing and approval of contracts under the Programme and the monitoring of the sale and delivery of petroleum products and the purchase and delivery of humanitarian goods, were violated; and
- (b) whether any such agents, contractors or entities engaged in any illicit or corrupt activities in the carrying out of their respective roles in relation to the Programme, including, for example, bribery in relation to oil sales, abuses in regard to surcharges on oil sales and illicit payments in regard to purchases of humanitarian goods;

AND WHEREAS the IIC in its final Report, published on **27** October 2005, made findings in respect of and identified certain South African companies or individuals that allegedly took part in illicit activities in relation to oil transactions, as well as humanitarian goods transactions, under the Programme;

AND WHEREAS the IIC unequivocally, and most unusually, raised a disclaimer in respect of its findings made in relation to such South African companies or individuals;

AND WHEREAS all but two of such identified South African companies or individuals are alleged to have refused to give any explanation to the IIC regarding their involvement in such alleged illicit activities;

AND WHEREAS it is not clear from the IIC's Report whether the findings of the alleged illicit activities by South African companies or individuals amount to criminal conduct in respect of which such entities could be charged in a South African court of law;

AND WHEREAS it is not clear from the IIC's Report, especially in light of the IIC disclaimer, the methodology followed by the IIC and the lack of response by most of the South African companies or individuals, whether any such South African company or individual was involved in criminal activities in terms of which criminal proceedings may be instituted against such company or individual in a South African court of law;

AND WHEREAS the **UN** Secretary-General called upon Member States to, where appropriate, take action against illegal practices by companies **and** individuals under their jurisdiction and to take steps to prevent future recurrence of such practices;

NOW THEREFORE, in order to advise the Government of South Africa, on the appropriate action or steps to be taken relating to the alleged involvement of any South African company or individual in such alleged illicit activities and the adoption of any preventative measures to avoid any such future illicit activities:

1. The Commission of Inquiry (hereinafter referred to as the Commission) shall conduct an investigation under the following terms of reference:
 - (i) Having regard to the Constitution of the Republic of South Africa, other relevant legislation, International Law, South Africa's international law obligations deriving from UN Resolutions, the Commission shall investigate, report on and make recommendations regarding the following matters:
 - (a) Whether the alleged surcharges on oil sales or illicit payments in regard to purchases of humanitarian goods or any other illicit payments in respect of the Programme, or the offer to make such payments, referred to in the Report of the IIC and as identified and set out in the attached Annexure, were in fact paid or offered to be paid, by such identified South African companies or individuals;

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- (b) If so, whether any such conduct, as outlined in the Annexure, of any such South African company or person, falls within the jurisdiction of a South African court of law; and
 - (c) If so, whether any conduct, as outlined in the Annexure, of such company or person, amounts to the commission of —
 - (aa) any offence, which offence may be tried by a South African court of law and whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution; or
 - (bb) any other illegal, illicit or irregular activity, which activity does not necessarily constitute an offence, but contravenes or violates any other South African law.
 - (d) In the case of the commission of any offence or illegal, illicit or irregular activity contemplated in paragraph 1(i)(c)(aa) or (bb) above, any proposed action or steps to be taken in respect of such offence, contravention or violation.
 - (e) Any further proposed actions or steps to be taken to prevent companies or persons falling under South African jurisdiction, from getting involved in future

illegal, illicit or irregular international activities, for example, sanction-busting in respect of internationally imposed sanctions, including the enactment of legislative measures or the establishment of systems and mechanisms, to ensure that such companies and persons do not, in future, contravene binding UN Resolutions.

- (ii) As a first step in the investigation, all evidence and information obtained and assessed by the IIC, which relate to South African companies or individuals and which may assist in this investigation, must be accessed and analysed.
2. The Commission shall commence with its duties forthwith and must report to the President within three months from date of the establishment thereof, or with the consent of the President, as soon as possible thereafter.
 3. These terms of reference may be added to, varied or amended from time to time.
 4. The Commission shall have the power to provide the President with interim reports.
 5. The Commission shall be subject to, and be conducted in terms of, the provisions of the Commissions Act, **1947** (Act No **8** of **1947**), as amended, and regulations made with reference to the said Commission.

ANNEXURE**OIL TRANSACTIONS: South African companies and individuals identified by the IIC as having participated in illicit activities relating to oil transactions**

Contracting company	Non-contractual beneficiaries (individuals)	Number of contracts	Barrels allocated	Barrels lifted	Contract value (USD)	Surcharges levied (USD) and contract number	Surcharges paid (USD)	Surcharges outstanding (USD)	Comments	Type of illicit activity to be investigated
Montega Trading (Pty) Ltd	Mr Sandi Majali	1 (Contract no: M/09/06)	2 million	1858530	45 502 470	464 633	None	464 633	1. IIC disclaimer applicable. 2. Company responded to allegations. 3. Clause in contract levying illicit surcharges. 4. Mr Majali did offer to pay the surcharges with the proceeds from the sale of oil that he hoped would be allocated to Imvume.	1. Offer to pay illicit oil surcharge.

Invume Management (Pty) Ltd	Mr Sandi Majali	2	6 million	4001505	100709660	None levied, because contract not executed.	None		Since the Invume contract was never executed, the surcharges were never paid.	<p>1. IIC disclaimer applicable.</p> <p>2. Company responded to allegations.</p> <p>3. Oil surcharges outstanding under Montega contract, made applicable to this contract, although it is a separate juristic entity, but were never paid.</p> <p>4. The IIC reported that an "advance"</p>	<p>1. Offer to pay illicit oil surcharge.</p> <p>2. Payment of an advance of \$60000, which was not included as an illicit surcharge by IIC.</p>
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Mocoh Services South Africa (Pty) Ltd	Michael Hacking (IIC records indicate that Mr Hacking made the surcharge payments into an account at Jordan National Bank)	6 (Contract no: M/08/54) (Contract no: M/09/40)	10800000	8592627	185 598268	94 631	94 631	480 068	(578)	payment, on contract M/11/72, of \$60 000 was deposited at the Central Bank of Iraq on 20 May 2002. Contract M/11/72 was never executed and as a result the IIC did not include this payment in its illicit oil surcharge or company tables.	1. Payment of illicit oil surcharge.
										1. IIC disclaimer applicable. 2. Company did not respond to allegations. 3. Underlying oil financier for contract M/09/40 was	

Omni Oil	Mr Shaker Al Khafaji	4 (Contract no: M/10/24)	5500000	2070270	38550168	621 081	621 000	8	Koch. 4. Bank records show that Mr Hacking made the surcharge payments on behalf of Mocoh. 1. IIC disclaimer applicable. 2. Company did not respond to allegations.	1. Payment of illicit oil surcharge.
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HUMANITARIAN GOODS TRANSACTIONS: South African companies and individuals identified by the IIC as having participated in illicit activities relating to humanitarian goods transactions

Supplier company	Number of contracts	Contract face value	Contract disbursements	Levied after-sales-service fees	Paid after-sales-service fees	Paid Inland Transport-ation fees	Comments	Type of illicit activity to be investigated
Ape Pumps (Pty) Ltd							1. IIC disclaimer applicable.	1. Payment of illicit after-sales-service fees (ASSF) and inland transportation fees.
Total contracts	3	1 178 535	1 303 660					
Contracts involving illicit payments in phases 8 and 10 of the OFFP	2	1 058 329	1 153 942	96 386	96 200	4 200	2. Company did not respond to allegations. 3. Evidence of illicit payments based entirely on actual data: a) The amount of after-sales-service fees levied is based on Company correspondence /documents. b) The amount of after-sales-service fees paid is based on Iraq's Ministry of Oil's financial data. c) The amount	

							of inland transportation fees paid is based on "other documents".	
Falcon Trading Group Limited							1. IIC disclaimer applicable.	1. Payment of illicit after-sales-service-fees (ASSF) and inland transportation fees.
Total contracts	16	45 637 870	49 126 767				2. Company did not respond to allegations.	
Contracts involving illicit payments in phases 9, 10 and 11 of the OFFP	9	27 776 197	28 906 134	2 525 111	2 627 830	14 063	3. Evidence of illicit payments based in whole or in part on actual data: a) The amount of after-sales-service fees (ASSF) levied is based on projected ASSF levied based on Government of Iraq policy documents. b) The amount of ASSF paid is based on projected ASSF paid based on Government of	

iraq policy documents.	c) The amount of inland transportation fees paid is based on (i) projected inland transportation fees based on Government of Iraq policy documents, where a fee was required but no specific information was available; (ii) projected inland transportation fees based on Government of Iraq policy documents that were partially confirmed by bank information; and (iii) where the amount was confirmed based on "other documents".
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4. The amount of inland transportation fees paid is a projected amount, since it represents contracts where inland transportation fees were required but no specific information was available to the IIC.	1. Payment of illicit after-sales-service fees.
Glaxo Wellcome SA (South Africa) (Pty) Ltd. Contract was concluded during phase 8 of the OFFP	1. IIC disclaimer applicable. 2. Company did not respond to allegations. 3. Evidence of illicit payments based entirely on projections derived from Iraq's uniform policy of requiring all contactors to make payments
1	19 836
243 241	22 113
218 194	

Reyrolle Limited								during certain contracting time periods.	
Total contracts	3	3 759 045	3 759 034	168 022				1. IIC disclaimer applicable.	1. Payment of illicit after-service fees.
Contracts involving illicit payments during phase 8 of the OFFP	1	1 848 246	1 848 246	168 022	168 022			2. Company did not respond to allegations.	
								3. Evidence of illicit payments based entirely on projections derived from Iraq's uniform policy of requiring all contractors to make payments during certain contracting time periods.	