

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, LOCAL DIVISION

Case number: 58950/21

In the matter between:

THE PRUDENTIAL AUTHORITY

Applicant

and

3SIXTY LIFE LIMITED

First Respondent

NATIONAL UNION OF METAL

Second Respondent

WORKERS OF SOUTH AFRICA

YASHODA RAM

Third Respondent

BDO ADVISORY SERVICES

Fourth Respondent

FILING NOTICE

KINDLY TAKE NOTICE THAT the first respondent hereby files the following:

DOCUMENT: FIRST RESPONDENT'S EXPLANATORY AFFIDAVIT

DATE ON ROLL: 22 MARCH 2022

SIGNED AND DATED AT SANDTON ON THIS 17TH DAY OF FEBRUARY 2022.



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REF: T MALATJI/L MAKGALWAI/N.M/M01031

**TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT**

**AND TO: EDWARD NATHAN SONNENBERGS INC
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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case Number: 58950/2021

In the matter between:

THE PRUDENTIAL AUTHORITY

Applicant

and

3SIXTY LIFE LIMITED

First Respondent

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

Second Respondent

YASHODA RAM

Third Respondent

BDO ADVISORY SERVICES (PTY) LTD

Fourth Respondent

FIRST RESPONDENT'S EXPLANATORY AFFIDAVIT

I, the undersigned,

KHANDANI MSIBI

do hereby make an oath and state that:



1. I am the Acting Chief Executive Officer of 3Sixty Life Limited ("**3Sixty**"), the respondent in these proceedings. I have the authority to depose to this affidavit on behalf of 3Sixty. A resolution of the board of directors to this effect is uploaded as "**026-4**" on CaseLines.
2. 3Sixty is a registered life insurance company and accredited to underwrite life and assistance policies. It was established in 1993 as HTG Life. The name was changed to Union Life in January of 2008 and subsequently re-branded as 3Sixty Life in 2018 to align with its parent company, 3Sixty Global Solutions Group through Doves Group.
3. In my position as Acting Chief Executive Officer my primary responsibilities include managing the operations and resources of the company.
4. The facts to which I depose herein are within my own personal knowledge and are, except where the context indicates otherwise or I expressly say so, to the best of my knowledge and belief, true and correct.
5. Any legal submissions that I may make are so made on the advice of 3Sixty's legal representatives and I believe them to be correct.

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6. Whilst reference is made in this affidavit to my first answering affidavit for the anticipated date to discharge the rule nisi, it is not necessary for this affidavit to be read with my first answering affidavit.

A. STRUCTURE OF THIS AFFIDAVIT

7. Whilst I am advised that it may not be necessary to oppose the specific application for a variation of court order that is already on record as being opposed and a court date is allocated, the first respondent does not support the variation of the court order that the applicant is applying for. Whereas the applicant is advised that the matter should be dealt with in its entirety, including the replacement of the curator at the hearing of the matter on 22 March 2022, 3Sixty is of the considered view that it should place pertinent facts before the court for its consideration. The purpose of this affidavit is to place such pertinent facts before the court.
8. I lay out the structure of this affidavit for the court's convenience as follows:
- 8.1. First, I highlight the developments in the *ex parte* application for provisional curatorship.
- 8.2. Secondly, I demonstrate the applicant's recklessness.
- 8.3. Third, I raise concerns of the applicant's abuse and undermining of court processes, despite the position of trust they occupy.

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8.4. Fourth, I show why the rule cannot, on legal grounds, reasonably be confirmed for failure to disclose material facts and misleading the Court.

8.5. Lastly, I demonstrate to the court the grounds in which this Honourable Court may cancel the appointment of the curator and discharge the rule nisi.

B. DEVELOPMENTS IN THE *EX PARTE* APPLICATION FOR PROVISIONAL CURATORSHIP

9. On 21 December 2021, the applicants approached this Court on an *ex parte* and urgent basis in camera. This Court granted an interim curatorship order against 3Sixty with immediate effect pending the return date of 12 April 2022. Ms Yashoda Ram was thereafter provisionally appointed as curator of 3Sixty.
10. The main reason advanced by the applicant for provisional curatorship of 3Sixty was that the management and Board of 3Sixty is unable to recapitalise the company to restore financial soundness. 3Sixty disputes this on the basis that the applicant had not adequately considered an Internal Recapitalisation Plan. Despite 3Sixty having tabled the Internal Recapitalisation Plan and its impact to the applicant on 6 and 7 December 2021, 3Sixty only learned of the applicant's concerns with the Internal Recapitalisation Plan after the applicant obtained an order for provisional curatorship of 3Sixty on 21 December 2021.

11. On 21 January 2022, the first respondent anticipated the return date, on urgent basis, to 1 February 2022 to discharge the rule nisi, based on applicant's failure to make full disclosure of all material facts to the Honourable Court and further misleading the Court in its application to place 3Sixty under provisional curatorship.
12. On 1 February 2022, before the Honourable Justice Dippenaar, at anticipation hearing to discharge the rule nisi, the matter was stood down to 3 February 2022. At this hearing the applicant pleaded that the matter is not urgent and should be heard on 12 April 2022.
13. On 3 February 2022, the Honourable Justice Dippenaar, upon consultation with the parties, made an order that the parties deliver further affidavits within the prescribed timelines, filing of an interim report by the provisional curator on the disputed impact of the Internal Recapitalisation Plan on 21 February 2022, heads of argument and that the matter would be set down on an expedited basis, as permitted by the Deputy Judge President, for a full day hearing on Tuesday 22 March 2022. The Honourable Justice Dippenaar was of the view that it was in the interest of justice that more time was required to hear the matter and that the matter was not dealt with on a piece meal basis.
14. On 15 February 2022, the applicant now brings an application for a variation order to the above Court, on urgent basis, that the words "Yashoda Ram" is replaced with the words "Tinashe Mashoko".



C. THE APPLICANT'S ABUSE AND UNDERMINING OF COURT PROCESS

15. In my initial affidavit I stated that whilst 3Sixty holds nothing against Ms Ram, 3Sixty does not believe she is a suitable candidate to assist 3Sixty with the challenges the applicant says Management and the Board of 3Sixty were not able to resolve, 3 Sixty thus argued that the applicant acted in the utmost hasty, reckless, and irresponsible manner in placing 3Sixty under curatorship.
16. The issue of Ms Ram's suitability for the role is a matter to be argued on 22 March 2022. I am concerned that the applicant's attempt to ask the court to replace Ms Ram is an abuse of the court to unduly address some matters I have raised in my initial answering affidavit. The applicant can address these issues in its supplementary affidavits to be argued on 22 March 2022, which are due on 21 February 2021.
17. Furthermore, when 3Sixty requested the court on an urgent basis to discharge the rule nisi, I indicated that the applicant's recklessness was demonstrated in choice of curator in that the applicant failed to appoint a person with appropriate experience. The applicant insisted that Ms Ram was suitable and denied that the applicant has failed to act responsibly with care and diligence. The applicant now comes to court indicating that they have only recently made enquiries about Ms Ram with the Actuarial Society. It is crystal clear that the applicant does not take the court in its confidence as to

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reasons for the belated inquiry into Ms Ram's qualifications. My initial affidavit points to many instances of such behaviour by the applicant.

18. As indicated earlier, on 3 February 2022, the applicant argued that matter of provisional curatorship of 3Sixty was not urgent and could be addressed on the return of 12 April 2022. The Honourable Justice Dippenaar was not convinced that the matter is not urgent and agreed that the matter be heard on an expedited basis on the date of her first availability, which happened to be 22 March 2022. For the applicant to now return to the court on urgent basis on 15 February 2022, after arguing against urgency on 3 February 2022 is an absolute abuse of the applicant's power and court process.
19. It appears, from preliminary information, that the report of Ms Ram in relation to the Internal Recapitalisation Plan due on 21 February 2022 is likely to vindicate 3Sixty that the Internal Recapitalisation Plan is valid in resolving financial soundness. Ms Ram's preliminary view is that the Internal Recapitalisation Plan is valid in covering the Minimum Capital Requirement two times. I refer in this regard to Ms Ram's email to 3Sixty Group Chief Financial Officer dated 16 February 2022 marked as annexure "EA1". This may have upset the applicant to the effect of wanting to temper with the report, cast doubt on the credibility of the report or even seek to have a curator that produces outcomes that are preferred by the applicant. Fortunately, despite the shortcomings we indicated about Ms Ram, she had not on this matter, sought to be an expert on financial soundness matters that the applicant claimed she was. She engaged an independent firm of



actuarial experts in determining the impact of the Internal Recapitalisation Plan. It is however concerning that Ms Ram may not be able to complete the report by herself as was required as she says her colleagues, Alethia and the team, "will conclude on the report" because she "will be offline for the next few days (from 16 February 2022)". This is despite Ms Ram being appointed in her personal capacity as provisional curator and not BDO.

20. For the above reasons, I submit that the court should consider carefully, in the light of the parties having appeared in the urgent court on 3 February 2022 and the events that unfolded since, if it is absolutely necessary that:

20.1. The court grants urgency for the applicant to correct the deliberate misleading of the court, by its neglect to do due diligence on Ms Ram's credentials when the opportunity presented itself on at least two occasions;

20.2. The applicant should be allowed the freedom to change its mind willy-nilly on urgency of matters related to curatorship of 3Sixty;

20.3. The matter should be dealt with in piecemeal against the views of Honourable Justice Dippenaar; and

20.4. Possible attempts to distract Ms Ram from concluding the report due from her on 21 February 2022 in terms of an order of court should not be condoned;

20.5. Lastly, the applicant has not met the requirements to seek a variation order.

21. I humbly submit that the court should err on the side of caution and not determine this matter piecemeal and allow the court to deal with all issues including the suitability of the provisional curator at the hearing of the matter on 22 March 2022. However, should the court hear the application, I am advised to bring to the Court's attention that this latest move by the applicant should result in the discharge of the rule nisi for justice to prevail. I explain this in the sections that follow.

D. THE APPLICANT'S RECKLESS CONDUCT IN THE APPLICATION FOR CURATORSHIP

22. The basis upon which the applicant brings this application for a variation order is that

*"It has recently come to the Authority's attention that Ms Ram's credentials were misrepresented to the above Honourable Court. In paragraphs 43 to 46 of my founding affidavit in the curatorship application."*¹

23. The applicant states that they believed that Ms Yashoda Ram was a suitable candidate for the position of provisional curator based on her "short resume"

¹ At para14 of the Founding Affidavit of the variation application.



and her profile on the BDO's website and as a result were "*comfortable with appointing Ms Ram as the provisional curator*".

24. With almost two months of 3Sixty being placed under provisional curatorship under the care of Ms Yashoda Ram, the applicants, *post facto*, sought to enquire with the Actuarial Society of South Africa (**ASSA**) on Ms Yashoda Ram's credentials, which thereafter revealed that she has not

"Completed an Actuarial Science degree, and was only a student member of ASSA. Contrary to what is recorded in the resume attached as annexure FA33 to the founding affidavit of the curatorship application, Ms Ram has not completed the Certified Enterprise Risk Actuary (CERA) course in 2016."

25. The applicant therefore brings an application for a variation order on urgent basis because it no longer has faith in the integrity of Ms Ram. I wish to therefore pause here and demonstrate the extent to which the applicant has fully acted in the utmost hasty, reckless, and irresponsible manner in placing 3Sixty for almost two months under the care of a "curator" whose credentials are bogus by the Applicants admission to the Court.
26. The conduct of Prudential Authority has prejudiced 3Sixty which has had a significant and irreversible effect to the business of 3Sixty. Since provisional curatorship, 3Sixty has already lost a retirement fund client that would have



accounted for 10% of its premiums in 2022 and is at serious risk of being terminated by other retirement fund clients. This reckless conduct has dire effects on 3Sixty's policyholders, direct and indirect jobs as well as shareholders.

27. The applicant ought to have done all background checks of their suitable candidate, who would act as a curator to a company which did not need to be placed under curatorship in the first place, prior to approaching this Honourable Court.
28. The extent of the applicant's recklessness and misrepresentation to the Honourable Court is further demonstrated by Ms Yashoda Rams confirmatory affidavit in support of her appointment as a curator in which she confirms that she is indeed the most suitable candidate which the applicant accepted without verifying.² Now, the applicant has not taken the court into its confidence as to what triggered their sudden interest and enquiries into Ms Ram's qualifications so late in the process. We have reason to believe that this may be related to the report on the Internal Recapitalisation Plan that Ms Ram is due to submit to court on 21 February 2022.
29. Furthermore, in my initial affidavit I stated that whilst 3Sixty holds nothing against Ms Ram, 3Sixty does not believe she is a suitable candidate to assist

² Confirmatory Affidavit of Yashoda Rams. CL Reference 003-116.

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3Sixty with the challenges the applicant says Management and the Board of 3Sixty were not able to resolve.³

30. I further expressed that there is no evidence that Ms Ram has the experience needed for this role. The applicant has failed to act responsibly with care and diligence on this important matter thus putting the business of 3Sixty at great risk. Despite these protestations in 3Sixty's answering affidavit of 21 January 2022, the applicant defended their process of selecting a curator for 3Sixty. Therefore, not only was the applicant reckless on initiation of their action but continued to act recklessly since then even when it was indicated to them that their process was flawed and reckless. The court should find it preposterous that the applicant, holding such an important role in upholding trust in the financial system that is a backbone of the South African economy, failed to conduct a simple due diligence on someone they claimed is appropriate to safeguard the interest of policyholders, employees and public at large.
31. The applicant's application to urgently place 3Sixty under curatorship was legally and factually flawed.
32. The applicant now makes this application with a Notice of Motion effortlessly requesting this Honourable court to replace the words "Yashoda Ram" with the words "Tinashe Mashoko" and thereafter it is business as usual.

³ At para 134 of the Answering affidavit to discharge the rule nisi. CL 010-50



33. The applicant now believes that their secondary preferred candidate should replace Ms Ram as the new candidate, Mr Tinashe Frank Mashoko is believed to be an Actuarial Specialist at BDO and worked closely with Mr Ram and the BDO team during the provisional curatorship. The applicant states that there ought not be a delay in his appointment as curator.
34. The applicant now vouches for this secondary candidate that he is an active fellow member of ASSA and is a fellow of the Institute of Actuaries in the United Kingdom. The applicant also attaches Mr Mashoko's ASSA membership certificate and letter of good standing as "FA4" and "FA5" respectively.
35. The applicant again relies on a brief resume and profile of Mr Mashoko as published on the BDO website annexed "FA3". The applicant does not indicate if the secondary candidate has ever done a solvency assessment of a life insurer in South Africa or has raised capital in the financial services sector in the South African market, yet the secondary candidate is supposed to assist 3Sixty recapitalise.
36. It is further questionable why the applicant would approach BDO for an alternative candidate and further select a candidate who worked very closely and was led by a person in relation to whom the applicant says "*the Authority no longer has faith in the integrity of Ms Ram.*"⁴ It is inconsistent that the applicant no longer has faith in Ms Ram, but still has faith in BDO, which the

⁴ At para 135 of the Answering affidavit to discharge the rule nisi. CL 010-50



applicant should hold responsible for having mislead it given the applicant's reluctance to do its own due diligence. We have reason to suspect that the real curator preferred by the applicant could be another person at BDO and not the candidates put forward. I have indicated the applicant's propensity to undermine court processes, and therefore the point I make here about the real curator should not come as a shock.

37. Again I had initially stated in the first affidavit to discharge the rule nisi that 3Sixty has observed that both Ms Ram and her support team, which includes Mr Mashoko, are out of their depth.⁵ Now that the applicant agrees with my views on Ms Ram after initially vehemently opposing such views, if the court were to err, it should err on the side of caution by believing my views over that of the applicant on Mr Mashoko as 3Sixty has had a painful two months of experience with him.

38. In appointing a suitable curator, regard must be had to:

38.1. Extensive experience in operations of a life insurance company.

38.2. Extensive experience in participating in the governance structures of a life insurance company.

38.3. Extensive experience in capital requirements and financial soundness of a life insurance company.

⁵ At para 134 of the Answering affidavit to discharge the rule nisi. CL 010-50

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- 38.4. Experience in capital raising or corporate finance.
39. As an example of authentic credentials for an actuary with experience in life assurance, reference may be made to the confirmatory affidavit of 3Sixty's actuary, Mr Ranti Mothapo, which transparently demonstrates vast experience in the South African life insurance industry.⁶ The credentials of 3Sixty's actuary were never questioned.
40. The applicant was grossly negligent in approaching the Court to place 3Sixty under curatorship on a trial and error basis without fully appreciating the impact this will have on 3Sixty.
41. I reiterate that the provisional *ex parte* order materially prejudices 3Sixty and has dire effects on its policyholders, the livelihood of 3Sixty's employees, as well as shareholders. Some of these policyholders are also the beneficial owners of 3Sixty.
42. For these reasons, the rule *nisi* ought therefore to be discharged.

**E. MATERIAL AND MISLEADING FACTS DISCLOSED IN THE NARRATIVE
OF SEEKING AN EX-PARTE APPLICATION**

⁶ Ranti Mothapo's Confirmatory Affidavit on CL 010-88

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43. I reiterate that the provisional curatorship is an unjustified, egregious, and considerably prejudicial interference by the Prudential Authority with the business of 3Sixty and that the rule nisi should be discharged.
44. I reiterate that the law is settled on the requirements for an *ex parte* order. 3Sixty submits that the applicant failed to make a full and fair disclosure and falls short of the settled requirements and therefore the rule falls to be discharged. The Material non-disclosure is fully ventilated in 3Sixty's the initial affidavit.⁷
45. The applicant misled the Court first with defamatory statements in seeking a provisional order and secondly by placing 3Sixty under curatorship with a Ms Ram whom the applicant informed this Court that they had faith in when they wished to appoint her.
46. The applicant took chances with the business of 3Sixty, the livelihood of its employees and failed to protect the interests of policyholders. The applicant has failed to protect the interests of policy holders, the same policyholders in which they held to have their best interests at heart.
47. Further, the applicant alleged to this Court that 3Sixty has a "*liquidity crisis*", whilst 3Sixty does not have a "*liquidity crisis*".

⁷ CL 010

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48. The applicant in approaching this Court for an application to place 3Sixty under curatorship and the appointed Curator, Ms Ram who initially failed to take into account Internal Recapitalisation Plan which is viable in significantly improving 3Sixty's financial soundness as confirmed by its actuary to the applicant.
49. By proving to the Honourable Court that the Internal Recapitalisation Plan is valid, and the concerns of the applicant are speculative and unsubstantiated, it should be clear that the applicant has acted with undue haste and recklessness to place 3Sixty under curatorship, such haste was even confirmed with their application for a variation of the order. The preliminary view of the provisional curator is that the Internal Recapitalisation Plan is valid in covering the Minimum Capital Requirement 2 times.
50. The applicant's failure to disclose the true facts to the Court is sufficient ground for discharging the rule.
51. The applicants have placed 3Sixty in a fragile position. Many jobs that are directly supported by 3Sixty will be at risk due to curatorship. 3Sixty has experienced signs that curatorship is detrimental to financial soundness of the business.
- 51.1. Ms Rams role has resulted in instances of delays in payment of claims and service provider invoices. This has caused anxiety and panic amongst stakeholders about the future of 3Sixty.



- 51.2. Ms Ram has failed to countersign the agreement to recapitalise 3Sixty with property assets, having been provided over two (2) weeks to consider the transaction.
52. 3Sixty is well staffed with competent professionals and actuaries who oversee the business and manages 3Sixty's financial soundness. 3Sixty should not be put in an even precarious position by substitution of curators who the applicant failed to vet.
53. The SCR and MCR of 3Sixty are independently reviewed by the Independent Head of Actuarial Function. There is no valid justification for a curator to contend with the role of the Independent Head of Actuarial Function.
54. For the reasons already advanced, I deny that curatorship is justified.

F. THE RULE NISI MUST BE DISCHARGED


55. The result of the absence of *audi alteram partem* to 3Sixty when the provisional order was made, and now the discovery of the reckless conduct which resulted in the calamity in appointing a bogus curator for almost two months prejudices 3Sixty and forced to approach the Honourable Court to ensure that the imbalance, injustice and oppression flowing from the order granted in its absence is redressed.

56. The ongoing material prejudice suffered by 3Sixty and its policyholders as a result of the applicant failing to make a full disclosure to the Honourable Court and further heavily misleading the Court in the application for curatorship, is not in the interest of justice.
57. 3Sixty suffers irreparable harm with each passing day and the discharge the rule nisi becomes more and more urgent on a daily basis.
58. I am advised that in terms of section 5(9) of the Financial Institutions (Protection of Funds) Act, 28 of 2001, the court may on good cause shown cancel the appointment of the curator at any time.
59. I submit that in our affidavit for anticipation date to discharge rule nisi and this affidavit, we have shown good cause why this Honourable Court should therefore cancel the appointment of the curator, Ms Ram and discharge the rule nisi. That this Court should not even consider the substitution of curators.
60. For all these reasons, I submit that the rule *nisi* be discharged with costs including the costs consequent upon the employment of two counsel on an attorney and client scale as well as the cost of the expert actuary, such that 3Sixty should not be out of pocket in relation to the costs of procuring the actuary's expert advice in the matter.
61. The various applications by the applicant are an abuse of the Court process and an abuse in the trust that the applicant inherently has in the public



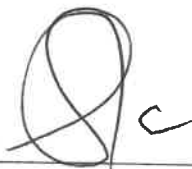
domain. By this latest application, the applicant seeks a variation of the court order. I am advised and believe that the grounds advanced do not satisfy any of the permissible grounds for the variation of court orders, whether in terms of the rules of this court or at common law.

62. The effect of the discharge of the rule is that the Internal Recapitalisation Plan through the disposal agreement between 3Sixty's Directors and Doves becomes effective and has immediate impact of resolving 3Sixty's financial soundness. The court should order that the prohibition imposed on 3Sixty of taking on new business by the applicant is lifted.



DEPONENT

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit, which affidavit was signed and sworn to at Sandton on this the 17 day of **FEBRUARY** 2022 in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.



COMMISSIONER OF OATHS

MMUDI CECILIA MABUYA
 Commissioner of Oaths
 Administration Clerk
 5th Floor, Katherine and West
 114 West Street, Sandton
 Johannesburg, South Africa
 REFERENCE No: 47/03/2012

RE: Curator Report to Court - Internal Recapitalisation Plan



Yashoda Ram <YRam@bdo.co.za>

To: Olu Luthaga; Ranti Mothapo; Ellan Cornish; Nobuhle Nkosi; Khandani Msibi

Cc: Alethia Chetty



Please treat this as Confidential.

Click here to download pictures. To help protect your privacy, Outlook prevented automatic download of some pictures in this message.

Hi Olu

Thanks again for sending this and for the brief discussion we had on Monday regarding same.

I include @Alethia Chetty who is assisting with pulling together the report and note as at this date the following outstanding additional info:

- 1) The property valuation team has derived similar to Spectrum but has identified vacant land to the value of R9m odd - are you aware of this and can you provide title deeds for this as it is on the same erf as the municipal accounts but will need a separate statement of value.
This brings the capitalized asset value to R130m
- 2) The independent actuarial view shows that MCR will be covered 2 times by the asset value if the MCR is R35m, however it would be prudent to please send updated actual Opex to verify this (@Ranti Mothapo)
- 3) The other experts have concluded their opinions and this will be summarised in the report due

I will be offline for the next few days however Alethia and the team will conclude on the report.

I wish you all well, speak soon.

Thanks
Yashoda



Reply

Reply All

Forward

...

Wed 16 Feb 2022 13:43

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