

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

63739/12

In the matter between:

EXXARO COAL (MPUMALANGA) (PTY) LTD	1 st Applicant
EXXARO COAL (PTY) LTD	2 nd Applicant
and	
THE MINISTER OF WATER AFFAIRS	1 st Respondent
THE JUDICIAL SERVICES COMMISSION	2 nd Respondent

FILLING NOTICE

DOCUMENT FILED: FIRST RESPONDENT'S ANSWERING AFFIDAVIT

Filed By:

THE STATE ATTORNEY


Salu Building

316 Francis Baard & Thabo Sehume Stree

PRETORIA

PRIVATE BAG X 91

PRETORIA

0001

Tel: 012 309 1634

Mobile nr: 0833515135

TO: REGISTRAR OF THE ABOVE HONOURABLE COURT, PRETORIA

AND TO: MAHLANGU INC

ATTORNEYS FOR THE APPLICANT

MCRONBERT BUILDING

C/O CHARLES AND DUNCAN STREETS

BROOKLYN

PRETORIA

TEL: (012) 425 3 690

FAX: (012) 425 3571

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
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EXXARO COAL (MPUMALANGA) (PTY) LTD

1st Applicant

EXXARO COAL (PTY) LTD

2nd Applicant

and

THE MINISTER OF WATER AFFAIRS

1st Respondent

THE JUDICIAL SERVICES COMMISSION

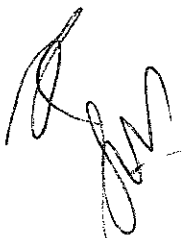
2nd Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

ANIL BIJMAN SINGH

do hereby make oath and state that:



- 1 I am employed by the Department of Water Affairs (hereinafter referred to as "DWA"), as a **Chief Director: Legal Services** , with my office at 317 Waterbron Building, 191 Schoeman Street, Pretoria, 0002, Gauteng Province.
- 2 I am duly authorised to depose to this Affidavit in my official capacity on behalf of the First Respondent by virtue of the general power of attorney annexed hereto marked **Annexure "ABS1"**.
- 3 Where I make legal submissions, I make same on the advice of my legal representatives.
- 4 The facts herein contained are both true and correct and save where the content indicates otherwise and are within my own personal knowledge.
- 5 I will first commence with a brief background and then proceed to answer the Applicant's Founding Affidavit.
- 6 It is submitted that these papers were prepared under great pressure of time and in haste due to the alleged urgent nature of this matter and that, the Applicants were unwilling to grant further indulgences of time. The First Respondent therefore reserves the right to supplement same.

POINTS IN LIMINE: LOCUSTANDI AND URGENCY

LOCUS STANDI

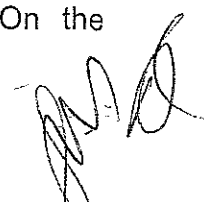


7 The Applicant has launched an urgent Application to review the decision of the First Respondent not to appoint members of the Water Tribunal.

7.1 However, before dealing with the allegations in the Founding Affidavit, at the hearing of the application it will be argued *in limine* that the Deponent to the Applicants' founding affidavit lacks locus standi to depose to the Founding Affidavit

7.2 It is submitted that the deponent's failure to furnish the resolution of the Board of directors of the Applicants authorizing this application is fatal if regard is had to the following annexures "D" and "E" which are letters written by Mahlangu attorneys dated 30th April 2012 and 15 June 2012. In paragraph six of this application the Applicant annexes these two letters in support of the fact that Mahlangu Incorporated replied to the two Directives which is the subject matter of this application. However in annexure "D" Mahlangu incorporated acts on behalf of Exxarro Glisa Colliery and not the Applicant. In annexure "E" Mahlangu attorneys acts for Exarro Leeupan Cole and not the Applicants. In annexure "E1" a letter dated 20 June 2012 Mahlangu Attorneys once more referred to Exarro leeupan Cole and not the Applicant. It is submitted that the Applicant were oblige to make out their case in the founding affidavit. It will not avail the Applicants to introduce a resolution in its replying affidavit. On this grong alone the Application stands to be dismissed .

7.3 secondly, it will be argued that the application is not urgent as will be demonstrated hereunder and on these grounds alone, the application stands to be dismissed with costs including the costs of senior counsel. On the



Applicant's own version by the 20th of September 2012 the Applicants had dispatched a letter threatening the first respondent that it will go to court if the first Respondent did not take the steps to reinstate the Water Tribunal

- 7.2 The officials of the First Respondent's departmental issued two directives that requires the Applicants to provide proof of authorisation for identified water uses and also for mining in a wetland; and
 - 7.3 Took a decision to institute criminal prosecution of the Applicants for these contraventions; and
 - 7.4 Took a decision not to appoint a new Water Tribunal panel after the then panel members' term of office came to an end in August 2012 in order to amend the NWA to align the Water Tribunal to existing tribunals such as the Consumer Tribunal and the Competition Tribunal
 - 7.5 Took a decision to implement mediation as an interim arrangement as envisaged in terms of section 150 NWA.
- 8 The First Respondent took the decision that the appointment of the Water Tribunal through the nomination process via the Judicial Service Commission was an unjustified deprivation by the legislature on her powers and authority as Minister of Water and Environmental Affairs in that it required the recommendation for the appointment of the Chairperson to be done via the Judicial Service Commission (JSC).



- 9 The First Respondent is of the view that the involvement of the JSC was a remnant of old order legislation being a historic legacy of the previous Water Courts in the 1940's and 1950's.
- 10 The First Respondent instructed that urgent legislative amendments to the National Water Act 36 of 1998 (NWA) be done and a draft National Water Act Amendment Bill 2012 was drafted, it still being a work in progress and being currently an internal document of the department.
- 11 On 30 August 2012 the Applicants and the department engaged in without prejudice round table negotiations to try to find an amicable resolution to the impasse and although the meeting did not reach resolution it was agreed that ongoing negotiations would be pursued.
- 12 On 9 September 2012 the First Respondent issued a Directive to implement mediation and negotiation as an interim solution whilst the NWA was being amended.
- 13 Section 150 of the NWA empowers the Minister to invoke mediation at any time and in relation to any dispute between any person relating to any matter contemplated in the NWA.
- 14 The Directive only specified mediation on the Ministers own initiative under the auspices of a mediation panel.
- 15 It is open to all Appellants to indicate that the choice of mediator(s) on their appeals should be agreed upon by mutual consent instead of nominating a mediator(s) from the existing mediation panel.

A handwritten signature in black ink, appearing to be 'M. A.', located in the bottom right corner of the page.

- 16 The Act is silent on the process of appointing the mediators and it was deemed prudent by the department that a panel of mediators consisting of persons with appropriate expertise be established to facilitate and expedite the mediation process of the appeals.
- 17 On 20 September 2012 the Applicants addressed a letter to the First Respondent requesting urgent reinstatement of the Water Tribunal.
- 18 A draft response was prepared but was not signed and despatched as the Respondent was confident that the mediation would be accepted by the Applicants.
- 19 The Applicants were informed of this mediation on 15 October 2012 by email from the Acting Registrar of the Water Tribunal. Annexed hereto marked **Annexure "ABS2"** is the email to the applicant for your easy of reference.
- 20 On 16 October 2012 the Applicants representative **Mr Tshenko Ratsheko** acknowledged receipt and undertook to revert regarding the suitability of the dates and also requested confirmation that both appeals would be mediated and the said acknowledgement email is annexed hereto marked **Annexure "ABS 3"**.
- 21 On 15 October 2012 an email confirming 7 November 2012 as a date for the mediation process was transmitted to the Applicants.
- 22 Subsequently the Applicants were furnished with the mediation rules and other documents to enable them to prepare for mediation.



- 23 Much to the surprise and disappointment of the First Respondent, the Applicants through their attorney of record somersaulted and sent a letter dated 31 October 2012 that they have decide to withdraw from the mediation.
- 24 This sudden about turn is ostensibly on the basis that the purported Directive is not fair and just administrative action yet the Applicants acquiesced and did not object to the Directive when it was first furnished to them.
- 25 The Applicants contend that the central issue is that its intended mining activities will not contravene the terms of the water use licence whilst the Department contends that the Applicants intended mining activities will contravene the terms of its water use licence. According to the Applicants, the crux of the issue is a legal dispute and therefore the mediation process cannot rule on a legal point. Yet this was also known by them when they received the rules of mediation but they did not object to the intended mediation process.
- 26 It is therefore clear from the above that differences exist on the approach between the Applicants employees and its legal representatives in respect of the handling of this issue.
- 27 It is submitted that the First Respondents' issuance of the Directives and implementation of mediation is not unfair and unjust administrative action as she is empowered in terms of the NWA to do so.
- 28 It is submitted that the mediation constitutes an internal remedy which must first be exhausted in terms of section 7(2) of PAJA which the Applicants have not done so.

A handwritten signature in black ink, consisting of stylized, overlapping letters, located in the bottom right corner of the page.

29 This application is therefore prematurely launched before this Honourable Court and it is also the First Respondent's contention that it is not urgent at all.

30 Moreover, the Applicants sat back and did nothing about this matter as it was convenient for them to do so.

31 When the First Respondent provides a possible resolution of the dispute, then the Applicants find it fit to take the route of urgent litigation as if the mediation process created a harm that justify the Applicants to approach this court on an urgent basis notwithstanding the fact that the current situation was there since the May 2012 when the Directives were issued or in August when the term of office of the Water Tribunal expired.

32 In essence the Applicants also failed to ask for reasons why their appeals against the Directives were not dealt with at all since May and June 2012.

33 In particular, Section 5 of PAJA stipulates that:

"5. Reasons for administrative action – (1) Any person whose rights have been materially and adversely affected by the administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(4)(a) An administrator may depart from the request the requirement to furnish adequate reasons if it is reasonable and justified in the circumstances, and must forthwith inform the person making the request of such departure. "

34 The Applicants have failed to request written reasons from the First Respondent's decision not to appoint a new Water Tribunal when the term of office of the previous Water Tribunal came to an end in August 2012.

35 In the premises, the Applicant's have launched this application prematurely and, in turn, the First Respondent has never waived its right to disclose its reasons for its decision in terms of Section 5(4) of PAJA.

36 Section 7(2) (a) and (b) of PAJA places an obligation on the complainant thereof, despite the time periods stipulated therein, to exhaust all internal remedies at its disposal before approaching this Honourable Court for a Judicial Review.

"7(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it not satisfied that any internal referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act. "

37 At present, by instituting this application the Applicant has not exhausted all the internal remedies available.

AD FOUNDING AFFIDAVIT:

38. **AD PARAGRAPHS 1 TO 4 THEREOF**

Save to deny that the deponent to the founding affidavit has Locus standi, the remainder of the averments contained in these paragraphs are admitted.

39. **AD PARAGRAPHS 5 TO 9 THEREOF**



The contents of these paragraphs are admitted.

40. **AD PARAGRAPHS 10 TO 13**

The contents of these paragraphs are admitted.

41. **AD PARAGRAPH 14**

The contents of these paragraphs are noted save to indicate that the Directive issued to the Applicant did not indicate the time and place due to the fact that the First Respondent found it plausible for the parties involved in the mediation process to have a mutual date for the mediation instead of imposing a date on them.

The Applicants' averments that the Act only empowers the Minister to appoint a mediator if the parties to the dispute have failed to appoint a mediator is incorrect and further, the fact that a mediation panel has been established does not mean that the mediation process will be conducted in front of the mediation panel as the parties has a choice to decide whether the dispute will be held before a panel of mediators or before a mediator. In fact, section 150(4) of the Act states that the parties can at any time during the mediation process may by agreement appoint any person to act as a mediator.

Section 150(1) of the Act does not contrary to the averments made by the Applicants in paragraph 14.3 indicates the nature of disputes that can be dealt with through a mediation process instead, the section provides that mediation can be invoked in respect of any dispute contemplated in this Act.

42. **AD PARAGRAPH 15 THEREOF**

Save to admit knowledge of annexure "K" and "L" referred to in these paragraph, the First respondent submit that it was never and still is not her intention to deny parties to the mediation process to exercise their rights as provided in section 150(4)

instead, the establishment of a mediation panel and making available mediation rules was done solely to expedite the mediation process to those parties who agrees to such an arrangement without depriving those parties who holds a differing approach to exercise their right in terms of section 150(4).

As indicated above, upon receipt of annexure "K" to the founding affidavit, the first response thereto from the applicants was not annexure "L" being the letter dated 23 October from the attorneys of record of Applicants but, an email dated 16 October 2012 from Mr. Ratsheko confirming receipt of annexure "K" and also undertaking to revert before close of business the following day with an indication whether the date suites the Applicants or not.

43. **AD PARAGRAPH 16 TO 18 THEREOF**

The contents of these paragraphs are noted save to reiterate that the Water Tribunal was placed in abeyance in order to align the Water tribunal with other tribunals trough a legislative review process and in the interim making use of the mediation process to deal with the appeals brought to the Water Tribunal. It is submitted that the interim measures established by the First Respondent are adequate to ventilate any dispute contemplated in the Act including the Applicants' appeals.

44. **AD PARAGRAPH 19 TO 25 THEREOF**

Further to what is stated in paragraph 43 above, it is the contention of the First Respondent that the Applicants have not been deprived of its constitutional rights in that, the mediation process is a forum with which the Applicants can assert their constitutional rights as provided in the Act. In fact, the Applicants have a duty to exhaust the internal remedies provided by the Act as required by section 7(2) of



PAJA before they can approach this court with an application to nullify the measures taken by the First Respondent to enable the Applicants to assert their rights.

45. **AD PARAGRAPH 26 THEREOF**

Reference to the provisions of the Constitution by the Applicants is noted save to underscore the fact that the conduct of the First Respondent is in line with the provisions of the constitution in that she invoked the provision of section 150 of the Act in order for the Applicants to exercise their constitutional rights in respect of their appeals. In doing so, the First Respondent did not contravene the constitution or any law as her act is within the parameters of the law as provided by section 150 of the Act.

46. **AD PARAGRAPH 27 THEREOF**

I reiterate that the First Respondent's conduct is in full compliance with the constitution and other laws that are relevant in ventilating the Applicants' dispute in terms of the Act and therefore, it is incorrect for the Applicants to portray the act of the First Respondent as a failure of the First respondent to execute her constitutional mandate in that, the First Respondent did not leave a vacuum but, did put a measure in place to deal with the Applicants' dispute.

47. **AD PARAGRAPH 28 TO 29 THEREOF**

The contents of these paragraphs are noted save to indicate that the temporary non-operation of the Water Tribunal did not leave the Applicant with no remedy in that, a mediation process has been put in place to deal with any issues that can be dealt with by the Water Tribunal. It is therefore the First respondent's contention that the Applicants' averment are unmerited.

48. **AD PARAGRAPH 30 TO 32 THEREOF**



The directive issued by the Minister is in line with the provisions of section 150 of the Act and it is therefore incorrect for the Applicants to aver that the First Respondent was not authorised to issue the Directive. The averments of the Applicants that the First Respondent's action contravenes the constitution and the NWA without substantiating such an averments does not hold any water as it flies in the face of the provisions of section 150 of the NWA and what is interesting from the Applicants' is their deliberate omission to refer to section 7(2) of PAJA which requires them to exhaust all internal remedies before they can approach this honourable court.

49 **AD PARAGRAPH 33 TO 39 THEREOF**

Failure on the part of the Applicants to substantiate their averments that following the mediation route will not stop the infringements of their rights is misplaced if regard is had of the purpose of the mediation process whose main objective is to deal with issues such as the Applicant's appeal. The Applicants are obliged to exhaust internal remedies before approaching the court with an application for a judicial review.

If the Applicants have a genuine concern to clear their names, they should have allowed the mediation process that was scheduled for 8 November 2012 to take place but, for no apparent reason, they decided to abandon a legitimate process meant to resolve their appeal. The fact that the parties are holding differing views does not justify the Applicants to reject the mediation process which will be facilitated by independent experts who may be able to assist the parties to reach a settlement on their dispute. The Applicant's contention that the appointment of the Water Tribunal is the only solution to their concern is far-fetched if cognisance is given to the time period required before a Water Tribunal is established which process can take not less than three months to be completed.



50. **AD PARAGRAPH 41 TO 45 THEREOF**

It is submitted that the Applicants' contention that they have no alternative remedy is without foundation. The Applicants were always aware that when they elected to participate in the mediation, a pre-mediation agreement could have been concluded so that the outcome of the mediation would be binding on the parties. It is further submitted that the Applicants' averments of no alternative remedy flies in the face of them having agreed in the instance to participate in the mediation.

51. **AD PARAGRAPH 46 THEREOF**

The allegations are denied in that the balance of convenience does not favor the applicant there being no determination of the lawfulness or otherwise of the directive, the balance of convenience favors' first respondent which has constitutional mandate to protect environment and our country's water resources. The applicants intended mining activities in a wetland violates the environmental protection and water laws of our country.

AD PARAGRAPH 47 THEREOF

The allegations are denied and I pray that the court takes cognizance of the first respondent ;s averment regarding lack of urgency as refer to the above

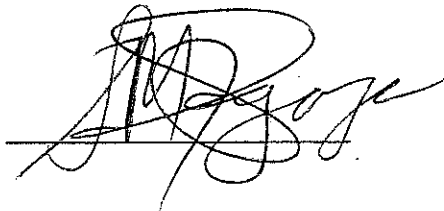
AD PARAGRAPH 48 THEREOF

The applicants are not entitled to the relief sought and I pray that the application be dismissed with costs, such costs on an Attorney and client scale including the costs of senior counsel.




DEPONENT

Thus signed and sworn to before me at Pretoria on this 13th of November 2012, the deponent, having acknowledged that he/she knows and understands the contents of this affidavit, that it is both true and correct to the of his/he knowledge and belief, that he/she has no objection to taking the prescribed oath and that the prescribed oath will be binding on his/her conscience.



COMMISSIONER OF OATH

Full Name: SYABUWELA MABASA

Designation: PRACTISING ATTORNEY

Address: SUITE 614-615 PROTEA TOWER
246 PAUL KRUGER STREET
PRETORIA
0001

TEL: (012) 328-7144

FAX: (012) 328-7177

Kavin/Poatt2a

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

GENERAL POWER OF ATTORNEY


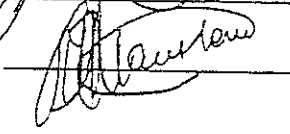
I, the undersigned, KADER ASMAL, MP, in my capacity as Minister of Water Affairs and Forestry, and as such representing the Government of the Republic of South Africa, hereby nominate and appoint the incumbents and future incumbents of the undermentioned posts in the Department of Water Affairs and Forestry, with power of substitution, to perform and to exercise on my behalf and in my place the actions and powers set out therein, in general and in all circumstances, and I confirm and approve hereby, and promise and agree to ratify, allow and confirm everything that my named assignee shall lawfully do or cause to be done in the premises as if personally present and acting herein.

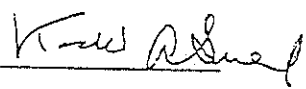
ACT	INCUMBENTS AND FUTURE INCUMBENTS OF RANKS TO WHOM THE POWER IS GRANTED
<p>1. To institute any legal action or to defend any legal action instituted against myself, and to sign any documents, applications, pleadings, notices and sworn affidavits in connection with such legal action.</p>	<p>Director-General Deputy Directors-General Chief Director: Financial Management and Administration; Chief Director: Scientific Services; Chief Director: Water use and Conservation; Chief Director: Regions; Chief Director: Water Services; Principal Legal Officer: Legal Services Senior Legal Officer: Legal Services.</p>
<p>2. To enter into any agreement in connection with the functions of the Department of Water Affairs and Forestry:</p> <p>Subject to -</p> <p>(a) agreements with Eskom and Local Authorities for the provision of electricity to departmental works at schemes where the maximum demand does not exceed 500 kilowatts;</p> <p>(b) agreements to lease departmental houses to people who are not officials of the Department;</p> <p>(c) agreements to hire by the Department, houses, offices and</p>	<p>Director-General Deputy Directors-General Chief Directors.</p>

<p>storerooms for a period that does not exceed one year;</p> <p>(d) agreements to lease dam basin land for grazing purposes for a period that does not exceed one year;</p> <p>(e) wayleave agreements with other institutions when the Department wishes to utilise their servitude areas or when the institutions wishes to utilise the servitude areas of the Department;</p> <p>(f) agreements with Local Authorities for the provision of services other than the provision of electricity; and</p> <p>(g) subject to the consent of the Director: Geohydrology agreements for the transfer of boreholes that the Department drilled to the land owners on which the borehole was drilled,</p> <p>can be entered into by Regional Directors and Area Managers in consultation with the Directorate Legal Services</p>	
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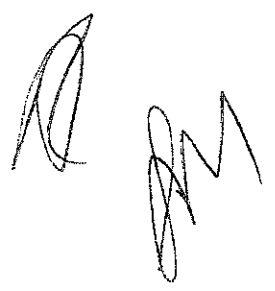
Signed at Pretoria on this 19th day of April 1999 in the presence of the undersigned witnesses.

Witnesses

1. 
2. 



MINISTER OF WATER
AFFAIRS AND FORESTRY



Tlhabadira Refilwe

From: Tlhabadira Refilwe
Sent: 15 October 2012 01:17 PM
To: 'tsheko.ratsheko@exxaro.com'
Cc: Singh Anil
Subject: EXXARRO COAL:MEDIATION PANEL

Good Day Mr. Ratsheko

I am pleased to inform you that your matter has been prioritized for mediation by the mediation panel which consist of people appointed by the Minister
The mediation will take place on the 5th to the 9th November 2012 with your matter being scheduled for the 7th November 2012, I trust that this date will be suitable to you and your clients.

Should the date not be suitable please indicate other dates and I will try to accommodate you depending on the availability of the members of the panel.

I trust you find above in order

Refilwe Patience Tlhabadira
Acting Registrar: Water Tribunal
Department of Water Affairs
Tel: (012) 336 6825
Fax no: 012 3367321
E-mail: TlhabadiraR@dwa.gov.za
Website: www.dwa.gov.za

Handwritten signature and initials in the bottom right corner of the page.

Tlhabadira Refilwe

From: Tsheko Ratsheko[HQ Environment] [Tsheko.Ratsheko@exxaro.com]
Sent: 18 October 2012 06:46 AM
To: Tsheko Ratsheko[HQ Environment]; Tlhabadira Refilwe
Cc: Singh Anil; Mongezi Vetu [HQP]; Mongezi Vetu [HQP]
Subject: RE: EXXARRO COAL:MEDIATION PANEL

Dear Ms Tlhabadira,

I confirm herewith that Exxaro accepts the date of the 7th November. Please confirm arrangements details including venue,time, the names of the panellists and the procedures.

We will await your urgent guidance in the above regard.

Regards

Tsheko Ratsheko

From: Tsheko Ratsheko[HQ Environment]
Sent: 16 October 2012 07:17 PM
To: 'Tlhabadira Refilwe'
Cc: Singh Anil
Subject: RE: EXXARRO COAL:MEDIATION PANEL

Good evening Ms Tlhabadira.

I confirm receipt of your email below and confirm that we have noted the date proposed, being the 7th November 2012. I will revert by close of business tomorrow or in the morning to confirm the suitability of the date proposed.

We sincerely appreciate the urgency you accorded our matters. Please note that Exxaro has submitted two appeals to the Water Tribunal(Leeuwpan mine and NBC Glisa mine) and in this regard trust that the two matters are both scheduled for the 7th November.

Regards

Tsheko Ratsheko

From: Tlhabadira Refilwe [<mailto:TlhabadiraR@dwa.gov.za>]
Sent: 15 October 2012 01:17 PM
To: Tsheko Ratsheko[HQ Environment]
Cc: Singh Anil
Subject: EXXARRO COAL:MEDIATION PANEL

Good Day Mr. Ratsheko

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Should the date not be suitable please indicate other dates and I will try to accommodate you depending on the availability of the members of the panel.

I trust you find above in order

Refilwe Patience Tlhabadira