REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-058137

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[redacted]

DATE SIGNATURE

In the matter between:

ZSCALER INC.	Applicant
and	
ACCELERATE NETWORKS SA (PTY) LIMITED	Respondent
In re the ex parte application of	
ACCELERATE NETWORKS SA (PTY) LIMITED	Applicant
and	
ZSCALER INC.	Respondent

JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This is an application brought by Zscaler Inc. ("Zscaler") for the reconsideration, rescission and setting aside of an *ex parte* order granted by Twala J on 26 August 2024. In terms of that order, Accelerate Networks SA (Pty) Ltd ("ANSA") was authorised to attach computer servers belonging to Zscaler at various premises within the jurisdiction of this Court. The attachment was intended to found and/or confirm the jurisdiction of this Court in respect of an action to be instituted by ANSA against Zscaler for damages on two fronts. ANSA also obtained leave to institute proceedings against Zscaler by way of edictal citation.

[2] Zscaler is a preregrinus company incorporated and domiciled in the United States of America. The attachment was sought for purposes of an action ANSA intended to institute against Zscaler in respect of two claims: First, a contractual claim arising from an alleged agreement concerning the opportunity to respond positively to a tender from ABSA Bank Ltd ("ABSA"); and Second, a delictual claim founded on alleged defamatory statements made by Zscaler to Dimension Data that has rebranded to NTT Data. For convenience in these proceedings it will be referred to as "Dimension Data".

[3] Zscaler seeks the rescission of the *ex parte* order and the release of the attached assets on the grounds that: (a) ANSA failed to make full and frank disclosure of material facts when it brought the *ex parte* application before Twala J; (b) ANSA's two claims are both bad in law and no proper *prima facie* case was made out for the granting of the order; and (c) this Court has no jurisdiction to adjudicate the disputes, which are required by a binding arbitration clause to be determined by arbitration in San Francisco, California, USA.

[4] ANSA resists the relief. Its essential answer is that the Distributor Agreement is irrelevant because its first claim arises from a separate agreement and, in relation to the second claim, from a delict independent of the Distributor Agreement.

Procedural history

[5] The factual and procedural background to this matter is largely common cause and may be summarised as follows.

[6] On 23 February 2023, Accelerate Networks International Limited ("ANI"), a company incorporated in Mauritius, concluded a written Distributor Agreement ("the Distributor Agreement") with Zscaler. In terms of the Distributor Agreement, Zscaler granted ANI a non-exclusive, non-transferable right to distribute subscriptions to Zscaler's products to persons or entities involved in the Zscaler Summit Partner Programme. The Distributor Agreement was governed by the laws of the State of California, USA.

[7] Clause 10.4 of the Distributor Agreement provided, in material terms, that all disputes arising out of or relating to the agreement would be finally settled by arbitration conducted in San Francisco, California, USA under the rules of Commercial Arbitration of the American Arbitration Association.

[8] Clause 10.11 of the Distributor Agreement contained a non-variation clause providing that no modification, amendment or waiver of any provision of the agreement would be effective unless in writing and signed by both parties.

[9] The agreement provided, among other things, that ANI was not permitted to sell, market or promote directly to customers; that any distribution would occur pursuant to approved quotes or sales proposals; that ANI would determine its own margin when selling to resellers; and that ANI would not be entitled to discounts, margins or compensation unless it had provided a quote for the relevant opportunity.

[10] In April 2023, ABSA issued a request for quotations for the supply of Zscaler products.

[11] On 26 April 2023, at a virtual meeting conducted via Microsoft Teams, representatives of Zscaler (Mr Robert Standing ("Standing") and ANI (Messrs Brett Steingo ("Steingo") and Brett Salovy ("Salovy") are alleged to have concluded a separate oral agreement in terms of which Zscaler undertook to provide ANI with certain Zscaler software products at an incumbent price

protection of 10%. The purpose of the agreement was to enable ANI to supply these products, through a reseller known as ISA, to ABSA in South Africa.

[12] On 28 April 2023, Standing confirmed this undertaking in a written email to Steingo and on 2 May 2023, a quotation followed.

[13] On 27 July 2023, ABSA informed ANI that the contract had been awarded to Amazon Web Services ("AWS") at a price some 15 to 20% lower than ANI's offer. ANI contends that this occurred because Zscaler supplied the required software to AWS at a price below the 10% price protection that had been promised to ANI, in breach of the oral agreement.

[14] In a separate sequence of events, it is alleged that in 2022, Standing met with Ms Padma Naidoo ("Naidoo"), the Head of Security at Dimension Data, and made statements to the effect that Dimension Data should cease procuring Zscaler products from ANI and instead redirect its procurement to NTT Ltd or Westcon Group (Pty) Ltd. ANI alleges that these statements carried the imputation that ANI conducted its business dishonestly and charged unreasonable margins. Following these statements, and from August 2023 onwards, Dimension Data ceased making any purchases of Zscaler products from ANI.

[15] On 6 November 2023, Zscaler purported to terminate the Distributor Agreement with ANI.

[16] On 22 January 2024, ANI concluded a written cession agreement in terms of which it ceded its damages claims against Zscaler to ANSA. This was plainly to ensure that the plaintiff in the intended damages claims against Zscaler would be a South African resident company and thus be in a position to attach Zcaler's property in South Africa to found and/or confirm jurisdiction of a South African court to determine the matter.

[17] ANI is a Mauritian company and the respondent (ANSA) is an associated company registered in South Africa. The disputes between the parties would, but for the cession, be disputes between an American and a Mauritian companies that would not be judiciable by a South African Court.

[18] On 8 July 2024, ANSA brought an *ex parte* application seeking, among other relief, an order authorising the attachment of Zscaler's computer servers to found and/or confirm the jurisdiction of this Court, and leave to institute action against Zscaler by way of edictal citation. ANSA's two claims were framed as follows:

a. Claim 1 (contractual): A claim arising from the alleged breach of the oral agreement concluded on 26 April 2023 for 10% incumbent price protection in respect of the ABSA bid, resulting in a loss of profit to ANI of USD 700,267.06; and

b. Claim 2 (delictual): A claim arising from the allegedly defamatory statements made by Standing to Naidoo at Dimension Data, causing Dimension Data to cease purchasing from ANI, resulting in a loss of profit to ANI of R19,066,026.70.

[19] On 26 August 2024, Twala J granted the *ex parte* order authorising the attachment. The computer servers belonging to Zscaler were attached at premises including Teraco Data Centre (Isando and Cape Town) and at premises of Dimension Data (Johannesburg and Cape Town).

[20] On 10 October 2024, Zscaler instituted the present reconsideration and rescission application.

The applicable legal framework

[21] An application for attachment to found or confirm jurisdiction is a recognised procedural mechanism, but it is extraordinary in character. It permits interference with property before the defendant has been heard. For that reason, the jurisdictional requirements must be properly satisfied.

[22] The applicant must establish, at least *prima facie*, a cause of action against the peregrinus. In *Hülse-Reutter v Gödde*[1], the Supreme Court of Appeal held that a prima facie case is established where there is evidence which, if accepted, will establish a cause of action; but the Court warned that the remedy is

[1] *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at 1340B–E.

exceptional and must be applied with care and caution. The evidence relied upon must consist of facts, not mere assertions, and any inference must be one that may reasonably be drawn from the alleged facts.

[23] An order to attach assets to found or confirm jurisdiction in respect of a contemplated action against a peregrinus is ordinarily and appropriately obtained *ex parte*. This is consistent with the established practice described in *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*, [2] where the Court observed that a defendant has no interest or right to notice of preliminary steps taken in anticipation of the institution of legal proceedings, and that a defendant's rights are not affected by the ex parte nature of such an application. The same principle is reflected in *Naylor v Jansen*[3] and *Tsung v Industrial Development Corporation of SA Ltd* .[4]

[24] However, the privilege of approaching the Court without notice to the other party carries with it a corresponding obligation of utmost good faith. It is settled law that an *ex parte* applicant must disclose all material facts that might influence the Court in deciding the application. In *Schlesinger v Schlesinger*[5], the Court held that: (a) in ex parte applications all material facts must be disclosed which might influence a court in coming to a decision; (b) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission; and (c) the Court, once apprised of the true facts, has a discretion to set aside the former order or to preserve it.

[25] This discretion was confirmed and elaborated upon by Howie P in *Phillips and Others v National Director of Public Prosecutions*:[6]

"*It is trite that an ex parte applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts,*

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[2] 2013 (4) SA 592 (GSJ) at paragraph 33
[3] 2006 (3) SA 546 (SCA) at 558F
[4] 2006 (4) SA 177 (SCA) at 182C-D.
[5] 1979 (4) SA 342 (W) at 348E-350B
[6] 2003 (6) SA 447 (SCA) paras 28–31.

to set aside the provisional order or confirm it. In exercising that discretion the later Court will have regard to the extent of the non-disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside."

[26] Where an attachment is ordered *ex parte* and it is afterwards sought to set it aside, the onus rests upon the respondent in the rescission application to satisfy the Court that, had all the facts been before the Court at the time, the attachment would nevertheless have been made.[7]

[27] The remedy under Rule 6(12)(c), although concerned with urgent orders, reflects the broader principle that a party affected by an order granted in its absence may approach the court for reconsideration. In *United Medical Devices LLC v Blue Rock Capital Ltd*,[8] the court set aside an *ex parte* attachment order where the applicant had failed to disclose material contractual provisions and where the order caused undue oppression.

[28] In order to succeed in an application for attachment *ad fundandam jurisdictionem*, the applicant must demonstrate: (a) a prima facie cause of action; (b) that the respondent is a peregrinus of this Court; and (c) that the respondent has property within the Court's jurisdiction. Once these requirements are satisfied, the Court has no discretion to refuse the attachment.[9]

[29] The standard of proof at the attachment stage is a prima facie case, not one that must establish the probability of success. Contradictory evidence on the part of the respondent does not defeat the application unless it shows that the applicant clearly has no legal claim.[10]

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[7] *Elscint (Pty) Ltd and Another v Mobile Medical Scanners (Pty) Ltd* 1986 (4) SA 552 (W) at 558E.
[8] Case no. 13398/2015 (unreported (5 March 2026)
[9] *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914E–G; *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228E–F
[10] *Simon NO v Air Operations of Europe AB* at 228D; *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) at 1343E–I; *MT Tigr* 1998 (3) SA 861 (SCA) at 868B–H.

[30] A judgment cannot be said to have been "granted erroneously" within the meaning of Rule 42(1)(a) merely because the respondent subsequently discloses a factual defence, or because legal objections not placed before the first Court are subsequently raised. The concept of an erroneous order refers to a procedural irregularity at the time the order was granted.[11]

Material non-disclosure

[31] The most prominent ground of rescission advanced by Zscaler concerns the alleged non-disclosure in the *ex p*arte application of the terms of the Distributor Agreement- specifically, the arbitration clause (clause 10.4) the non-variation clause (clause 10.11), the pricing and discount clause (clause 5.2) and the limitation of liability clause (clause 9.3).

[32] ANSA's position, stated in paragraph 14 of its founding affidavit in the *ex parte* application, was that the Distributor Agreement was "*not relevant*" to the disputes between the parties. The Distributor Agreement was, however, physically annexed to the papers placed before Twala J. The question is whether ANSA's characterisation of the Distributor Agreement as irrelevant constitutes a material non-disclosure of facts that ought to have been placed before the Court.

[33] ANSA's case is that its two claims do not arise from the Distributor Agreement at all. In respect of Claim 1, ANSA contends that the oral price protection agreement concluded on 26 April 2023 was a separate, freestanding agreement unconnected to the Distributor Agreement. In respect of Claim 2, ANSA contends that the defamatory statements by Standing constitutes delictual conduct unrelated to the parties' contractual arrangement. On this basis, ANSA submits that the arbitration clause contained in clause 10.4 of the Distributor Agreement has no application to either claim.

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[11] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at paragraphs 22–25.

[34] In my view, the question of whether ANSA made full disclosure to Twala J cannot be assessed in isolation from the underlying substantive question of whether the arbitration clause does or does not apply to ANSA's claims. If ANSA's characterisation of its claims is correct, then its statement that the Distributor Agreement was "*not relevant*" would not constitute a material non-disclosure warranting rescission. If, on the other hand, the claims are properly characterised as arising out of or relating to the Distributor Agreement, then ANSA's failure to bring the import of clause 10.4 to Twala J's attention becomes a potentially decisive non-disclosure.

[35] The test derived from *Schlesinger*[12] and *Phillips*[13] requires me to ask: (a) whether there was a non-disclosure of material facts; (b) whether the first Court (Twala J) might have been influenced by proper disclosure; and (c) what the consequences of setting the order aside would be.

[36] On the first consideration, I have already observed that the Distributor Agreement was physically placed before Twala J. What was not adequately disclosed was the specific significance of clause 10.4 and the arbitration provisions. ANSA's characterisation of the Distributor Agreement as "*not relevant*" was, in light of the genuine and arguable breadth of clause 10.4, an incomplete and potentially misleading presentation of the position.

[37] ANSA did bring to the Court's attention that both claims arose outside the scope of the Distributor Agreement. The Court was accordingly aware that the Distributor Agreement existed and that ANSA took the position that it did not govern the claims in question. Whether this was sufficient, or whether Twala J ought also to have been specifically informed of the terms of clause 10.4 and left to make his own assessment of whether the claims fell within it, is the critical question.

[38] Zscaler's evidence of the applicable foreign law - as to which there is no dispute - is that clause 10.4 has been interpreted by Californian law to cover all disputes arising out of or relating to the agreement, including disputes that might be

[12] *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-350B.
[13] *Phillips and Others v NDPP* 2003 (6) SA 447 (SCA) paras 28-31.

characterised as tortious if they have a sufficient connection to the agreement. On this view, Twala J should have been made aware that there was at least an arguable case that both claims were governed by the arbitration clause.

[39] In considering whether Twala J might have been influenced by proper disclosure, I must assess whether, had the terms of clause 10.4 been specifically placed before him with the explanation that Zscaler would contend that both claims fell within that clause, he would have declined to grant the order or at least required a fuller inquiry.

[40] The key deficiency in ANSA's *ex parte* presentation was not merely that it described the Distributor Agreement as irrelevant - the Court could see for itself that the agreement was there - but that ANSA failed to draw the Court's attention to an arguable and potentially dispositive legal point about the scope of the arbitration clause, a point that should have been brought squarely before the Court so that Twala J could make a properly informed decision about whether to grant the relief sought.

[41] There was a material non-disclosure in the *ex p*arte application, namely ANSA's failure to properly place before Twala J the terms and significance of clause 10.4 of the Distributor Agreement and the at least arguable applicability of that clause to ANSA's claims.

[42] It is probable that had Twala J been properly apprised of this position, he would have given the matter more careful scrutiny and might not have granted the order on the basis presented to him.

[43] The Distributor Agreement was plainly material. It was the written instrument governing the commercial relationship through which ANI was entitled to distribute Zscaler products. It regulated pricing, quotes, margins, reseller conduct and the circumstances in which ANI would be entitled to compensation.

[44] ANSA's contractual claim was founded upon alleged obligations concerning the ABSA opportunity. That opportunity concerned Zscaler products, a quote issued by Zscaler, ANI's role as distributor, and the alleged pricing advantage

or discount to be afforded in relation to a reseller/customer opportunity. Those matters fall squarely within the subject matter of the Distributor Agreement.

[45] The contention that the Distributor Agreement was irrelevant is therefore unsustainable. At the very least, it was a fact which might have influenced the court hearing the *ex parte* application.

[46] The arbitration clause was even more material. It went directly to the propriety of this Court assuming jurisdiction through attachment. A court asked to attach property to found or confirm jurisdiction over a foreign defendant must be told that the relevant written agreement contains a foreign arbitration clause.

[47] The failure to place the existence, import and jurisdictional consequences of clause 10.4 properly before Twala J was material. Zscaler's heads submit that the court was misled in that regard, and that the non-disclosure alone warrants rescission.

[48] I agree. It is no answer to say that ANSA considered the agreement irrelevant. The duty is not to disclose only facts favourable to the applicant's theory. It is to disclose facts which may influence the court, including facts adverse to the relief sought.

[49] Had the court been told that the written agreement governing the relationship contained a California arbitration clause, a non-variation clause and provisions regulating precisely the commercial terrain from which the dispute arose, the court might well have refused the attachment or at least required further explanation.

[50] I think it probable that Twala J would at least have considered the scope of the arbitration clause more carefully, and that his decision might have been different. This is sufficient to meet the test in *Phillips*.[14]

[51] ANSA has not persuaded me that, had all the relevant facts been properly placed before Twala J, he would nonetheless have granted the attachment order. I am satisfied, to the contrary, that the proper disclosure of the arbitration

[14] *Phillips and Others v NDPP* 2003 (6) SA 447 (SCA) paras 28–31

clause and its potential scope would have introduced sufficient uncertainty about the legal foundation of ANSA's claims that Twala J would at the very least have required a fuller hearing before granting the order, if he would have granted it at all.

[52] Furthermore, in dealing with its second claim, ANSA failed to disclose that the Dimension Data contract had terminated by the effluxion of time and may thus the failure to place any further orders through ANI may have nothing to do with the alleged defamatory statements.

[53] The respondent has thus not satisfied its onus as set out *Elscint*.[15]

[54] This in and of itself is dispositive of the matter. I will, however, nevertheless consider whether the claims were *prima facie* established in the sense that at least a triable issue was raised.

Claim 1:

a. The oral agreement and the Shifren clause precluding variation

[55] ANSA's first claim depends upon an alleged separate oral or partly oral agreement.

[56] According to the Intendit, Claim 1 is founded upon an oral agreement, alternatively a partially oral and partially written agreement, concluded on 26 April 2023, in terms of which Zscaler allegedly undertook to supply ANI with Zscaler products at a 10% incumbent price protection for the purposes of the ABSA bid.

[57] Zscaler's response is twofold: First, that no such agreement could exist alongside the Distributor Agreement by reason of the non-variation clause; and second, that even if such an agreement existed, it falls within clause 10.4 of the Distributor Agreement and must be referred to arbitration.

[58] Zscaler's primary submission is that the Distributor Agreement's non-variation clause (clause 10.11) operates to preclude any oral variation of or amendment

[15] *Elscint (Pty) Ltd v Mobile Medical Scanners (Pty) Ltd* 1986 (4) SA 552 (W) at 558E–H

to the agreement, with the result that the oral price protection arrangement alleged by ANSA has no binding effect. Zscaler relies on *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* [16]and *Brisley v Drotsky* .[17]The principle is settled: where parties have agreed that variations must be in writing and signed, the courts will generally enforce that bargain.

[59] Zsacler argues that the alleged contractual obligation relied upon by ANSA appears to concern discounts, pricing, reseller opportunities and the ABSA transaction. Those are not extraneous matters. They are the very matters regulated by the Distributor Agreement.

[60] ANSA's response is that the oral agreement of 26 April 2023 was not a variation or amendment of the Distributor Agreement at all: it was an entirely separate, collateral agreement governing a specific transaction (the ABSA bid) that was independent of and additional to the distribution arrangement regulated by the Distributor Agreement. ANSA argues that the Shifren principle has no application to agreements that do not purport to vary or amend the Distribution Agreement.

[61] This distinction drawn by ANSA is not without legal merit. The Shifren principle operates to preclude the modification or variation of the terms of a subsisting written contract by subsequent oral agreement. It does not, however, preclude the conclusion of a new and separate oral contract between the same parties, provided the new agreement does not seek to alter the terms of the existing written contract. The question is therefore whether the alleged price protection arrangement truly constituted a freestanding agreement, or whether it was in substance a variation or amplification of the Distributor Agreement.

[62] ANSA's response is that the oral agreement of 26 April 2023 was not a variation or amendment of the Distributor Agreement at all: it was an entirely separate, collateral agreement governing a specific transaction (the ABSA bid) that was independent of and additional to the distribution arrangement regulated by the Distributor Agreement. ANSA argues that the Shifren principle has no

[16] 1964 (4) SA 760 (A)
[17] 2002 (4) SA 1 (SCA).

application to agreements that do not purport to vary or amend the existing written contract.

[63] Zscaler's counsel made reference to clause 5.2 of the Distribution Agreement which he urged me to read together with the definitions of a "*reseller*" in clause 1 of the Distribution Agreement. Clause 5.2 reads:

"***Zcaler Summit Partner Program and Retail Price List.*** *Distributor shall be compensated by Zscaler for an opportunity based on Distributors assigned tier in the Zscaler Summit Partner Program, as agreed to separately by the parties. Distributor may obtain a copy of Zscaler's C Summit Partner Program and Retail Price List upon request. Prices do not include sales, use, VAT, excise, export, withholding, or similar taxes or fees. ZScaler reserves the right to change the Retail Price List for the product at any time; however, any such price change will not affect orders in progress. For clarity, Distributor shall have sole discretion to determine pricing to Resellers, is solely responsible for invoicing a Reseller for any applicable fees distributor charges a Reseller, and is solely responsible for collection of any such fees from Reseller. Distributor will not be eligible for any discounts, margin, or other compensation from Zscaler unless it has been provided a quote for the relevant opportunity.*"

[64] The respondent was defined as the "*Distributor*". It was stated that the Distribution Agreement governs distributors of the products (as defined in the Agreement) to Resellers as defined.

[65] In the definition section, a "*Resell*er" is defined as "*any persons or entities enrolled in the Zscaler Summit Partner Program that purchases for resale the products from Distributor to resell to customers*."

[66] "*Customer*" is defined as "*an entity that purchases a subscription for the Products from Reseller, for its own internal business use in the territory, and not for further resale or distribution to third parties*." "*Product*" in turn means those Zscaler products "*distributed by Distributor to Resellers' Customers pursued to a Quote.*" A "*Purchase Order*" means "*a purchase order that is submitted by Distributor to Zscaler for the product (as set forth in the Quote*)." A "*Quote or Sales Proposal*" means *"the approved written quote or sales proposal issued*

by Zscaler to Distributor which sets for the opportunity information, such as products being ordered, pricing, customer name and address, etc."

[67] Finally, "*Sale or Sell or Resell or Resale or Purchase*" means "*the granting or receiving of subscription access and use of the product as authorised by Zscaler pursuant to the terms and conditions of this agreement*."

[68] In terms of clause 3.1 of the agreement the Distributor agrees to distribute and provide the products only to Resellers in the territory that are enrolled in the Zscaler Summit Partner Program.

[69] Bearing these definitions in mind, the opportunity to respond to the Absa tender may well have fallen within the definition of the "*sale*" or "*resale*" of the "*product*" to ABSA pursuant to a quote from Zscaler and the Distribution Agreement, including the non-variation clause, would have been binding on the respondent. As such, not only should these provisions have been disclosed, but they may have excluded Claim 1 as it referred to a discount that had not been reduced to writing and signed by the parties.

[70] The terms of the allegedly separate agreement were confirmed by Rob Standing ("*Standing*") of Zscaler in an email to Brett Salovy/ Brett Steingo dated 28 April 2023. In this email Rob Standing recorded:

"*Hi Brett,*

Following on from the conversations yesterday, now that Asa have released the R FP for Zskyler-They have requested two quotes:

- *1 yr as is purchase*
- *3 yr ELA purchase*

We've already received a couple of partners request and as the distributor for this, we'll be pointing them in your direction.

As previously explained AN will receive an incumbent price protection of 10% on the renewal portion. As you can see ABSA are purchasing more than originally licensed for and all additional spend will be priced at the same rate for *all bidders. This leaves AN still with a significant advantage over the rest but we urge you to be aggressive on the pricing with your partners to get the best result for all.*

As I'm flying today,@Zaheer Ahmad will share two quotes on this thread later today as soon as they're fully approved –all pricing is positioned with a strict expiry of July 31st, to be able to complete within ABSA's renewal debt and Z scaler end of FY."

[71] On Zscaler's version, the entire commercial relationship between ANI and Zscaler was governed by the Distributor Agreement, and the pricing arrangements applicable to any particular transaction were necessarily regulated by or reliant upon that agreement. On ANSA's version, the price protection arrangement for the ABSA bid was a specific, transaction-level undertaking by Zscaler that existed independently of the broader Distribution Agreement.

[72] I note that the email of 28 April 2023 from Standing confirming the price protection does not, on its face, make explicit reference to the Distributor Agreement. However, as I have said, the alleged contractual obligation relied upon by ANSA appears to concern discounts, pricing, reseller opportunities and the ABSA transaction. Those are not extraneous matters. They are the very matters regulated by the Distributor Agreement.

[73] As Claim 1 appears plainly to fall within the ambit of Clause 5.2 which precluded discounts being afforded to distributors, without a formal amendment signed by the parties allowing a 10% price protection to allow ANSA to secure the ABSA tender, it broadly speaking did fall within the ambit of the Distribution Agreement. The quotation that followed the alleged conversation was a quote delivered pursuant to the Distribution Agreement.

[74] ANSA's attempt to characterise the alleged obligation as separate and independent does not withstand scrutiny. The evidence shows that the ABSA opportunity was in all likelihood discussed pursuant to the commercial relationship created by the Distributor Agreement.

[75] Applying, the Court must not finally decide the merits, but it must insist upon factual allegations which, if accepted, establish a cause of action.

[76] Despite my misgivings, I am mindful that I am not entrusted to decide the substantive contractual issues that will ultimately fall to the trial court for adjudication. All that need be established before me is that a *prima facie* case be established. I cannot say at this stage that ANSA's characterisation of the price protection agreement as a freestanding transaction unrelated to the Distributor Agreement is so manifestly untenable as to deprive Claim 1 of any *prima facie* foundation. There are issues of interpretation of clause 5.2 and the intention behind the 28 April 2023 arrangement that may arise during the course of evidence that may or may not require that the arrangement be reduced to writing and signed by the parties in accordance with the non-variation clause of the Distribution Agreement.

[77] There are at least triable issues as to whether the oral agreement was separate and distinct from the Distributor Agreement. [18]The Shifren point is a proper substantive defence which Zscaler may advance at trial, but it does not nullify the claim at the attachment stage.

b. The scope of the arbitration clause (Claim 1)

[78] Clause 10.4 of the Distributor Agreement provides that "*all disputes arising out of or relating to this agreement*" are to be finally settled by arbitration in San Francisco, California. The question is whether Claim 1, which ANSA characterises as arising from a separate oral agreement, falls within the scope of this clause.

[79] If ANSA's characterisation of the oral agreement as a freestanding arrangement is accepted, there is at least a credible argument that disputes concerning that arrangement do not "*arise out of or relate to*" the Distributor Agreement, and accordingly that clause 10.4 has no application to Claim 1. That argument may not ultimately prevail - especially if a trial court finds that the price protection arrangement was inextricably linked to ANI's role as Zscaler"s distributor under

[18] *Gross v DM* 2025 (2) SA 172 (GJ).

the Distributor Agreement - but at the stage of the attachment application, it was not patently untenable.

[80] In the circumstances, I find that the question of whether Claim 1 falls within the scope of clause 10.4 is a triable issue.

Claim 2:

a. The delictual claim and whether it is capable of cession

[81] ANSA's Claim 2 arises from the allegedly defamatory statements made by Standing to Naidoo ("*Naidoo*") of Dimension Data, which ANSA alleges caused Dimension Data to cease purchasing from ANI, resulting in a patrimonial loss to ANI of R19,066,026.70. The claim is framed as one for special damages (loss of profit) flowing from the defamatory statements.

[82] Zscaler challenges Claim 2 on three grounds: (a) that the claim is bad in law because the *actio iniuriarum* cannot be ceded before *litis contestatio*; (b) that even if the claim is cast as an Aquilian action, it falls within clause 10.4 of the Distributor Agreement and must be referred to arbitration; and (c) that ANSA has failed to make out a *prima facie* case on the merits, particularly in relation to causation, given ANSA's own averment in its answering affidavit that the contract between ANI and Dimension Data expired by natural effluxion of time.

[83] The central legal issue in relation to Claim 2 concerns the cession by ANI to ANSA of the damages claim arising from the alleged defamatory statements. Zscaler's position is that a claim based on the *actio iniuriarum* cannot be ceded before litis contestatio, and accordingly that Claim 2 could not lawfully have been ceded to ANSA at all.[19]

[84] ANSA's response is that Claim 2 is not a claim under the *actio iniuriarum* at all. ANSA explicitly frames Claim 2 as a claim for special (patrimonial) damages

[19] Scott, *Cession: A Treatise on the Law in South Africa* at 169–170 and *Pienaar & Marais v Pretoria Printing Works Ltd and Others* 1906 TS 654.

only - specifically, the loss of profit suffered by ANI as a result of Dimension Data’s cessation of purchases - founded in the *actio legis Aquiliae*.

[85] ANSA relies on the analysis in *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd*[20] for the proposition that claims for special/patrimonial damages arising from a defamatory publication must be pleaded and proved as an Aquilian action, and that Aquilian claims for patrimonial loss are freely ceded. The Supreme Court of Appeal confirmed that a claim for patrimonial losses resulting from defamatory publications is properly founded in the *actio legis Aquiliae* rather than the *actio iniuriarum*, and that the elements of proof for the two actions differ accordingly.

[86] The principle articulated in *Media 24* is that where a plaintiff seeks to recover only patrimonial loss (loss of profit) flowing from defamatory statements, the correct avenue is the Aquilian action, not the *actio iniuriarum*. A claim framed exclusively as an Aquilian claim for patrimonial loss is, in principle, assignable by cession.

[87] Zscaler's reliance on the *iniuriarum* rule is therefore misplaced in the present context. The question is whether Claim 2 is properly characterised as an *iniuriarum* claim or an Aquilian claim. ANSA has consistently characterised it as the latter, and as I understand its particulars of claim (as set out in the founding affidavit and the *intendit*), no general damages for injured feelings or harm to reputation as such are sought. The claim is squarely framed as a loss of profit claim under the Aquilian action.

[88] In these circumstances, Zscaler’s cession objection does not defeat Claim 2 at the *prima facie* stage. The claim is at least arguable as an Aquilian action, and an Aquilian claim can be validly ceded.

[89] Zscaler’s counsel raised a further issue, namely that in terms of clause 9.2 of the Distribution Agreement liability for damages is limited. This provides in capital letters that:

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[20] 2011 (5) SA 329 (SCA)

"*Except for gross negligence, fraud, or intentional misconduct,(I) in the event shall either party have any liability for any indirect, special, incidental, punitive consequence damages, including but not limited to any lost profits, loss of data, loss of use, costs of procurement of substitute goods or products, however caused, whether in contract, tort or and any other theory of liability and whether or not such party has been advised of the possibility of such damage or loss; and (II) each party's aggregate liability to the other and any third-party (including customers) arising out of this agreement or otherwise in connection with any subscription to the product, shall in no event exceed the payments made by Distributor to Zscaler during the twelve (12) months prior to the first event or occurrence giving rise to such liability. Distributer acknowledges and agrees that the essential purpose of this section is to allocate the risks under these terms between the parties and limit potential liability given the fees charged for the products, which would have been substantially higher if Zscaler were to assume any further liability other than a set forth herein, Zskaler has relied on these limitations in determining whether to provide the product under this agreement.*"

[90] Whether or not this clause applies to the claim for damages for loss of profit flowing from defamatory statements conveyed to Dimension Data is not without proper interpretation clear. It may well, however, appear after the hearing of evidence and argument at the trial that this clause is of application that may limit the damages claim for defamation brought by ANSA.

b. *The causation issue*

[91] Zscaler raises a more specific challenge to the merits of Claim 2 that I regard as more compelling. Zscaler draws attention to ANSA's own statement at paragraph 30.5 of its answering affidavit in the rescission application, where ANSA alleges that the contract between ANI and Dimension Data "*expired by natural effluxion of time when Dimension Data re-evaluated its vendors and stopped sending purchase orders to ANI*." Zscaler argues that this admission defeats the causation element of Claim 2. Clearly, if Dimension Data's disengagement from ANI was the natural result of a contractual expiry and a

vendor re-evaluation, it cannot be attributed to Standing's allegedly defamatory statements.

[92] ANSA responds that the cause of Dimension Data's disengagement was the defamatory statements by Standing, not the lapse of any fixed-term agreement. The "*natural effluxion of time*" reference is, on ANSA's version, a description of the form of the disengagement rather than its cause.

[93] This is, in my view, a genuine factual dispute on the papers that cannot be resolved at this stage. However, the tension in ANSA's own pleaded case - and the possibility that the causation element of Claim 2 may ultimately not be established - are factors that I take into account when exercising my overall discretion in reconsidering the attachment application.

d. *The failure to properly plead the factual basis for the innuendo pleaded*

[94] Zscaler argues that the defamatory meaning alleged by ANSA does not appear *ex facie* the statements allegedly made. I agree with this. In truth, ANSA relies on an innuendo that Dimension Data should not purchase from ANSA because they are dishonest or disreputable. It is, however, trite that to establish an innuendo, it is necessary to plead the background facts and circumstances which have not been pleaded in the *indendit*.

[95] Nevertheless the failure of ANSA's pleading does not necessarily mean that a prima facie case has not been established and on this ground, I am prepared to give ANSA the benefit of the doubt.

c. *The scope of the arbitration clause (Claim 2)*

[96] I turn to Zscaler's contention that Claim 2 also falls within clause 10.4 of the Distributor Agreement on the basis that the defamatory statements relate to the relationship between ANI and Dimension Data, which was itself conducted under the umbrella of ANI's distributorship of Zscaler products.

[97] ANSA's response is that Standing's statements to Naidoo constituted conduct entirely extrinsic to the Distributor Agreement; they were statements made at a

personal meeting and concerned the commercial reputation of ANI rather than any matter arising from the Distributor Agreement.

[98] Whether Standing's conduct in allegedly inducing Dimension Data to cease purchasing from ANI falls within a dispute "*arising out of or relating to*" the Distributor Agreement is genuinely controversial. The statements were allegedly made in the context of Zscaler's commercial relationships with distributors of its products, which is the subject matter of the Distributor Agreement. However, Standing's conduct was not itself regulated by any express term of the Distributor Agreement, and the connection is not therefore as direct as Zscaler suggests. This too is a triable issue.

Reconsideration and discretion

[99] The Court is not bound to preserve an *ex parte* attachment merely because a case was put up at the first hearing. Once the affected party appears and places the full facts before the Court, the Court must reconsider whether the order ought to stand.

[100] *Blue Rock*[21] is instructive. There, an *ex parte* attachment order was set aside where a material contractual provision had not been brought to the court's attention and where the order created oppressive consequences.

[101] The present case is similar in principle. The omitted facts were not peripheral. They went to the heart of jurisdiction, forum, the existence of a cause of action, and whether the attachment was competent at all.

[102] The attachment was sought to found or confirm jurisdiction. But the very agreement governing the commercial relationship directs disputes to arbitration in San Francisco.

[103] The existence of a foreign arbitration clause does not physically prevent a party from approaching a South African court; but it is a powerful and usually decisive

[21] *United Medical Devices LLC and Others v Blue Rock Capital Ltd and* Others (KZN Local Division, Case No 13398/2015)

factor against permitting a party to found jurisdiction by attachment in order to litigate here in disregard of its bargain.

[104] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*,[22] the Court emphasised the importance of an adequate connection between the dispute and the forum, and identified factors such as the governing law, convenience, background facts and where the parties carry on business.

[105] Here, the governing contractual forum points away from this Court. Zscaler is based in the United States. The Distributor Agreement points to California arbitration. The claim is rooted in that agreement or in a relationship governed by it.

[106] ANSA's reliance on South African connections is not sufficient. The ABSA opportunity had South African features, but the relevant legal relationship was not thereby transformed into one properly triable in this Court contrary to the parties' arbitration bargain.

[107] This is not a case where attachment is required to give efficacy to a South African forum that is naturally and substantially connected to the dispute. It is rather an attempt to create jurisdiction in South Africa despite the contractual forum selected by the parties and both parties residence outside of the court's jurisdiction.

[108] The attachment of Zscaler's servers is an intrusive remedy. It should not stand where the *ex parte* applicant failed to make full disclosure and where the underlying claims only just got over the *prima facie* hurdle facing them.

[109] Drawing together the various threads of analysis set out above, I must exercise the broad discretion that the law vests in me as the court hearing the reconsideration application.

[110] On the one hand:

[22] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP)

a. ANSA's Claim 2 faces a potentially significant causation difficulty arising from ANSA's own pleaded case, namely, the admission that Dimension Data's disengagement may have resulted from a natural contractual re-evaluation rather than from Standing's statements; and

b. The Shifren clause presents a real obstacle to Claim 1 that was not adequately disclosed to the *ex parte* Court.

[111] On the other hand:

a. The Distributor Agreement was physically placed before Twala J, and its existence was not concealed;

b. ANSA's characterisation of the claims as falling outside the scope of the Distributor Agreement is not manifestly untenable; there are genuine triable issues on both claims.

[112] The standard for *ex parte* attachment relief is a low one: only a *prima facie* case is required.

[113] At the *prima facie* stage, contradictory evidence from the respondent does not defeat the application, since the Court cannot at this stage resolve disputed questions of fact and law.

[114] Setting aside the order will not permanently extinguish ANSA's rights. ANSA will remain free to approach a court of competent jurisdiction (or the arbitration tribunal in California, if the arbitration clause ultimately proves applicable) to pursue its claims.

[115] I have weighed these considerations carefully. In my judgment, the balance falls in favour of rescission, primarily on the basis of the material non-disclosure of the terms and potential significance of clause 10.4 of the Distributor Agreement as well as the fact that the Dimension Data agreement had been terminated by the effluxion of time.

[116] It is probable that had Twala J been properly apprised of this position, he would have given the matter more careful scrutiny and might not have granted the order on the basis presented to him;

[117] The key deficiency in ANSA's *ex parte* presentation was not merely that it described the Distributor Agreement as irrelevant - the Court could see for itself that the agreement was there - but that ANSA failed to draw the Court's attention to an arguable and potentially dispositive legal point about the scope of the arbitration clause, a point that should have been brought squarely before the Court so that Twala J could make a properly informed decision about whether to grant the relief sought.

[118] In accordance with the onus articulated in *Elscint*, ANSA has not persuaded me that, had all the relevant facts been properly placed before Twala J, he would nonetheless have granted the attachment order. I am satisfied, to the contrary, that the proper disclosure of the arbitration clause and its potential scope would have introduced sufficient uncertainty about the legal foundation of ANSA's claims that Twala J would at the very least have required a fuller hearing before granting the order, if he would have granted it at all.

[119] In reaching this conclusion, I emphasise that I am not deciding that ANSA's claims are bad in law, or that they are subject to the arbitration clause, or that this Court lacks jurisdiction. All of those questions remain open for determination by the appropriate tribunal. What I am deciding is that the *ex parte* order cannot stand, because it was obtained without proper disclosure of material facts that might have influenced the granting judge. The consequences of setting the order aside are not fatal to ANSA's substantive rights: ANSA retains whatever rights it has and may pursue them through the appropriate legal channels.

Costs

[120] Zscaler seeks costs on the attorney-and-client scale, citing the material non-disclosure and the conduct of ANSA in the proceedings. I have found that there was a material non-disclosure. Non-disclosure in *ex parte* applications is a

serious matter, and the courts have consistently expressed their disapproval of it.[23]

[121] The duty of full disclosure in *ex parte* proceedings is fundamental. ANSA failed to disclose facts of obvious materiality.

[122] In *United Medical Devices*,[24] the Court granted attorney-and-client costs where the *ex parte* attachment had been ill-considered and where there had been a failure of full and frank disclosure.

[123] However, *Multi-Links* cautions that punitive costs are exceptional and should not be granted merely because a party erred in law or because an *ex parte* order is set aside.

[124] In this matter, the non-disclosure concerned the central written agreement and its arbitration clause. The omission was substantial. ANSA's later insistence that the agreement was irrelevant was unreasonable. This justifies a cost order against ANSA.

[125] But does this justify a punitive costs order?

[126] The very fact that the respondent attached the Distribution Agreement to its application is suggestive of its relevance. Its averment that it was not relevant ought properly to have been substantiated.

[127] A judge in a busy motion court cannot be expected himself to interrogate the Distribution Agreement and determine whether in fact is irrelevant. It was ANSA's duty to draw the clauses that may be deemed relevant to Twala J's attention, at the same time indicating why in its view they were not relevant. ANSA did not attempt to do this at all; instead it relied upon the fact that the judge hearing the matter would accept its word that the Distribution Agreement was not relevant.

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[23] *Schlesinger* at 354A-E.
[24] U*nited Medical Devices LLC and Others v Blue Rock Capital Ltd and Others* (KZN Local Division, Case No 13398/2015)

[128] The test in this regard is extremely low; it is only that Twala J, knowing the true facts, may not have granted the order or may have made further inquiries. I am of the firm view that had the terms in the Distribution Agreement dealt with in this judgment, and in particular the arbitration clause, been drawn to Twala J's notice, he would have at the very least sought further comprehensive argument.

[129] A further consideration is ANSA's conduct in the procedural history of the rescission application itself. ANSA filed its answering affidavit only two days before the hearing that had been set down on the unopposed roll, despite having had ample opportunity to do so. On 16 April 2025, Crutchfield J already made an order for costs on the attorney-and-client scale in respect of the wasted costs occasioned by that conduct. That order stands separately.

[130] In addition, ANSA failed to deliver its heads of argument timeously and required a demand letter from DLA Piper before it complied. It declined to participate in the drafting of a joint practice note, necessitating a unilateral practice note by Zscaler. These factors inform the overall backdrop against which costs are to be considered.

[131] Bearing in mind all the circumstances, including the nature and extent of the non-disclosure, I am persuaded that a punitive costs order is appropriate.

Order

[132] In the result, the following order is made:

1. The order granted *ex parte* by this Court on 26 August 2024 under case number 2024/058137 is reconsidered, rescinded and set aside.
2. The attachment authorised under that order is discharged.
3. Any assets, rights or property attached pursuant to the order shall be released forthwith.
4. The respondent, Accelerate Networks SA (Pty) Ltd, shall pay the costs of this application on the scale as between attorney and client, including the costs of counsel.

[redacted]

WENTZEL-THOMPSON J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing: 2 March 2026

Date of judgment: 27 April 2026

Appearances:

For the Applicant (Zscaler):	HC Bothma SC, instructed by DLA Piper South Africa (RF) Inc
For the Respondent (ANSA):	Adv L Hollander, instructed by Swartz Weil Van der Merwe Greenberg Inc