In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No 347

BETWEEN GLENDINA PTY LIMITED (AND OTHERS) PLAINTIFFS

AND

NKWE PLATINUM LIMITED DEFENDANT

COSTS RULING

RSC Order 62 rules 2 (4) 3 (3) and (10); applicability of the exceptions in ***In re Elgindata No 2*** *[1992] 1 WLR 1208*

Date of Hearing: 8 June 2026

Date of Ruling: 30 June 2026

Appearances

Tom Lowe KC of Wilberforce Chambers and *Sam Riihiluoma* of Appelby (Bermuda) Limited for the Plaintiffs

Donald Lilly KC of 4 Stone Buildings and *Jonathan O'Mahony* of Conyers Dill & Pearman Limited for the Defendant

MARTIN J

Introduction

1. This is the court's Ruling on two separate issues of costs arising in these proceedings. The first issue is the award of the costs of the proceedings following a seven-day trial in December 2024. The second issue relates to the costs of an application that was made by

NKWE Platinum Limited (hereafter "the company") to require the plaintiffs to give disclosure of documents which related to the plaintiffs' engagement of their attorneys in Australia and Bermuda. The application was grounded in a concern that the fee arrangements did not comply with the indemnity principle and that this might impact the court's decision in relation to the determination of the costs of the proceedings. The court will address each of those matters separately.

The costs of the main proceedings

2. The main proceedings concerned an appraisal action brought by the plaintiffs under section 106 (6) of the Companies Act 1981 following the compulsory acquisition of their shares in an amalgamation transaction which was concluded in October 2018. Under the amalgamation agreement the Offer Price that was accepted by the majority of shareholders was AU$ 0.10 per share. The plaintiffs did not agree that this price represented the fair value per share and brought these proceedings for the court's appraisal of the fair value to be attributed to their shares. The full history of the transaction is set out in detail in the court's Judgment dated 5 February 2025[1].

3. The main theme behind the plaintiff's claim was that the company's mining development project at Garataouw Farm, situated on the edge of the Merensky Reef which is a well established source of platinum group metals in South Africa, was at an advanced preproduction stage, and that the potential profitability of the mine had not been reflected appropriately in the Offer Price.

4. Expert evidence was adduced by the plaintiffs from Mr Andrew Van Zyl, who is an expert in minerology in South Africa, as to the likely existence of mineral reserves at the site. In addition, expert valuation evidence of projected revenues and profitability of the mine was presented in a report prepared by Ms Dawna Wright, who is a valuation expert based in Australia. The range of values proposed by the plaintiffs' experts to represent fair value were between AU$ 0.22 and AU$ 0.27 (leaving aside possible uplifts as a result of tax adjustments for losses carried forward)[2].

5. In response, the company relied upon the experts who prepared the original Fairness Opinion that supported the recommendation from the board to the shareholders. Expert evidence was adduced by the company from Mr Graham Jeffress, who is a mining and engineering expert, and Ms Nadine Marke, who is a valuation expert in based in Australia[3]. The range of values proposed by the company's experts to represent fair value were between AU$ 0.07 and AU$ 0.158 with a mid point of AU$ 0.125 before applying a minority discount of 25% which reduced the midpoint range to below AU$0.10[4].

6. There was a small amount of evidence from witnesses of fact, but the overwhelming majority of time and effort was spent in presenting, cross examining and analysing the evidence of the

[1] [2025] SC (Bda) 15 civ 4 February 2025.
[2] Judgment at paragraph 209.
[3] The financial experts were based in Australia because the shares which were the subject of the amalgamation were traded on the Australian Stock Exchange.
[4] Judgment at paragraphs 278 and 326.

expert witnesses[5]. This meant that the bulk of the costs in the proceedings related to the presentation of the valuation issues.

7. It was an unusual feature of the case that the court rejected the evidence of the experts called by the plaintiffs, for reasons that will be examined in more detail below. Nonetheless, the court was satisfied that the evidence supported an appraisal of the fair value of the shares at AU$ 0.13, which was not a value put forward by either side. The reasons for this result were explained in the Judgment.

8. At the conclusion of the Judgment the court made a provisional ruling on the costs of the proceedings to the effect that, since the plaintiffs had succeeded in achieving a fair value figure per share in excess of the Offer Price, the plaintiffs should have the costs of the proceedings, applying the rule that costs (normally) follow the event. The company took up the opportunity to be heard on costs, and this is the court's decision following that hearing.

The company's position

9. Mr Lilly KC submitted[6] on behalf of the company that the court should disallow the recovery of the costs of the proceedings against the company because the evidence given by the plaintiffs' experts on valuation was rejected. Mr Lilly KC submitted (in short) that because the bulk of the costs incurred in the proceedings overall related to dealing with the plaintiffs' valuation evidence that was rejected by the court, the company should not have to pay the costs of the proceedings, even though the plaintiffs succeeded in establishing liability[7].

10. Mr Lilly KC accepted that the usual approach taken by the courts in Bermuda is to make a costs order that reflects the overall outcome of the case and not to apply an issues based assessment of the costs attributable to the main issues in the case, which is now routinely done in England under the CPR[8]. However, he submitted that even according to the traditional principles established under the older English cases which are applied in Bermuda under the RSC[9], the correct approach for the court to take is to analyse the result to see whether the successful party caused a significant increase in the length or cost of the proceedings by taking points which the successful party did not need to take and on which they lost.

11. Because over 90% of the costs of the proceedings were attributable to the valuation issue, and the plaintiffs' evidence on that issue was rejected, Mr Lilly KC submitted that the company should not have to pay the costs of the proceedings incurred by the plaintiffs or the court should discount the costs of the plaintiffs by 100%, in effect resulting in no order for costs, or alternatively that the recovery of costs should be discounted by 90%[10].

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[5] Mr Lilly KC estimated that it exceeded 90% of the time at trial.

[6] The first edition of the Ruling unfortunately recorded Mr Lilly KC's submissions incorrectly. This revised edition has corrected those errors, pursuant to the jurisdiction of the court to do so prior to the issue of a perfected Order (see **Re LB (Children)** [2013] UKSC 8). This revised edition of the Ruling does not affect the substance of the decision that was made.

[7] See paragraph 2 of Mr Lilly KC's written submissions.

[8] Civil Procedure Rules 2000 (as amended) that apply in England and Wales.

[9] Bermuda Rules of the Supreme Court 1985.

[10] Mr Lilly KC's written submissions at paragraph 5 and his oral submissions on 8 June 2026 at 10.20 am.

12. Mr Lilly KC relied upon what he called the third principle of the general rule that costs follow the event explained in the classic statement of the rule by Nourse LJ in **In re Elgindata No 2** [1992] 1 WLR 1208 at 1214 A-D.

13. That case was a petition under section 459 of the English Companies Act 1985 which alleged that the affairs of the company had been carried on in a manner that was unfairly prejudicial to the minority shareholders. The court rejected most of the claims made by the petitioners in that case, but found in their favour on others, and ordered that the petitioners pay three quarters of the majority shareholder's costs. On appeal in relation to the trial judge's ruling on costs, the Court of Appeal reversed the judge's decision, holding that the fact that the petitioners had lost on some of the issues did not mean that the petitioners were to be deprived of their costs in relation to the points on which they had lost. The principle is summarised in the headnote as follows:

> *"... a successful party to an action who had not acted improperly or unreasonably in raising issues ought not to be ordered to pay any part of the unsuccessful party's costs;"*

14. It is worth also setting out the statement of the principles given by Nourse LJ in his judgment:

> *"The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs (iv) Where the successful party raises issues or makes allegations improperly or unreasonably , the court may not only deprive him of his costs but may order him to pay the whole or part of the unsuccessful party's costs. Of these principles, the first, second and fourth are expressly recognised or provided for by rules 2 (4), 3 (3), and (10) respectively. The third depends on well established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs. It was because of his disregard of that principle that the judge erred in law."*

15. Mr Lilly KC submitted that the plaintiffs' conduct of the proceedings fell within principle (iii) because the plaintiffs did not need to rely upon their experts at all in order to achieve the result the court arrived at, and so the plaintiffs should not recover the costs associated with the plaintiffs' expert evidence applying principle (iii) or discount the plaintiffs' costs by 100%. In either event, the plaintiffs should not get their costs of the proceedings. Alternatively, Mr Lilly KC said that the appropriate discount should be 90%.

The plaintiffs' position

16. Mr Lowe KC responded that this approach would be to introduce by the back door the application of an issues-based costs assessment which was not appropriate. Although Mr Lowe KC accepted that the court always has the power to make an issues-based award if there

were particular circumstances that justified it, in this case there were no compelling reasons to do so. The expert evidence was necessary and appropriate and related to the main point in the case: it is a valuation case, and valuation evidence is neither unnecessary nor unreasonable, even if the court rejected some or part or all of the evidence. He submitted that the plaintiffs were successful and should be entitled to their costs in the ordinary way.

The court's assessment

17. I agree with Mr Lowe KC's submissions for the following reasons. In the first place, RSC Order 62 rule 3 (3) provides that, subject to the court's power to exercise its discretion to make any order it sees fit, the court *shall* order the costs to follow the event. Therefore, that is the starting point for the court's evaluation of what is appropriate in the circumstances any particular case. A departure from that starting point requires the exercise of judicial discretion based on good reasons, and (broadly) involves an evaluation of whether the court considers it just to make a different order on the particular facts of the case. Here, the plaintiffs won their case, fair and square.

18. It is clear what the policy behind the general rule is: a party whose position is vindicated in real life terms at trial should be entitled to recover the costs associated with achieving that vindication. Therefore, in accordance with that principle, the plaintiffs in this case should ordinarily be entitled to an award of all their costs, including legal costs and the fees and expenses of the expert witnesses, which can be (in some cases) as much as or more than the legal costs.

19. In the second place, the expression of principle (iii) in Nourse LJ's summary makes it clear that a successful litigant is not to be deprived of their costs just because they have been unsuccessful on some issues or did not prevail in persuading the court to accept the allegations that they made. The same must apply where the court does not accept some of the evidence relied upon by the successful party.

20. In this case, the plaintiffs' expert evidence was not adduced in support of some extraneous or irrelevant issue which increased the length and cost of the proceedings, it was the central issue in the case. In my judgment, the application of principle (iii) is reserved for cases where the successful party runs arguments which are not relevant to the determination of the main issue, and which would not have been determinative of the case in any event, but which were included as 'kitchen sink' arguments, possibly intended to increase the costs and complexity of the proceedings for strategic reasons. That is plainly not the case here. Therefore, in my judgment, there is no room in this case to apply the first exception and to deprive the plaintiffs of their costs of the expert evidence, even though the court had to reject it as being an unreliable basis on which to approach the appraisal of the fair value of the shares.

21. The court should mention briefly that the court did not reject the plaintiffs' expert evidence completely, contrary to Mr Lilly's KC's broad submission to that effect. The court did accept Mr Van Zyl's evidence to the extent that he agreed with Mr Jeffress as to the comparable property values of other sites, even though Mr Jeffress' evidence was very thin[11]. It was this evidence on which Ms Marke relied for her analysis, and which had also underpinned the

[11] Judgment at paragraphs 145 and 274-8.

original draft Fairness Opinion on which the court ultimately relied, in the absence of anything better.

22. It is wholly artificial and unreal to suggest that the plaintiffs could have presented their case on valuation without adducing expert evidence as to the correct methodology to apply to derive a fair value for the shares.

23. I also agree with Mr Lowe KC's submission that the approach advocated by Mr Lilly KC would have the practical result of turning the award of costs into an issues-based costs assessment in every case. While the court undoubtedly possesses the power to take that approach in cases in which the court considers it appropriate to do so, it is not the general rule. In this case, I see no reason why the ordinary costs rule should not be applied. The court therefore rejects Mr Lilly KC's invitation to apply either of the exceptions to the 'costs follow the event' principle set out in Nourse LJ's judgment. The court considers that the provisional order for costs was the correct order and therefore makes a final order in those terms based on the application of the general rule that costs follow the event under RSC Order 62 Rule 3 (3).

24. However, in case I am held to be wrong on the application of these principles, the court also considers that it would be entirely contrary to ordinary notions of both common sense and justice to disallow the plaintiffs their costs of the expert evidence (or discount those costs by 100% or 90%) for reasons which I shall now briefly explain.

25. The court will not here repeat the analysis of the expert evidence set out in the Judgment, but I rely upon the passages of the assessment of the expert evidence at paragraphs 128-145 (Mr Van Zyl) and paragraphs 244-257 (Ms Wright) where the court explained its reasons for having to reject the higher valuation calculations based on a DCF projection because the inputs were too unreliable for the court to make any conclusive findings on fair value.

Mr Van Zyl's evidence

26. In summary, Mr Van Zyl's evidence was premised upon two valuation reports produced by Venmyn Deloitte which referred to the declaration of a mineral reserve as well as a mineral reserve declaration statement signed by Mr Lotz of DRA Consultants. The Venmyn Deloitte reports were commissioned by the company, and the mineral reserve declaration statement was produced to support the company's reliance on the Venmyn Deloitte valuations in its financial statements. The Venmyn Deloitte valuations were adopted and approved by company's board and were included as support for the financial statements which were then audited and presented to the shareholders and published in accordance with the ASX Listing Rules.

27. Mr Van Zyl also relied upon various steps that had been taken by the company (e.g. the Early Works Programme) to progress the development of the project which he believed were consistent with the company having declared that the Garatouw Project was at a predevelopment stage. He deduced from those factors that the company had made a *de facto* declaration of a mineral reserve in relation to the Garatouw Project.

28. Although these documents (and the steps taken by the company in furtherance of the development of the Garatouw Project) clearly suggested that the company believed that the

site was capable of development, there was no evidence that there had in fact been a declaration of a Mineral Reserve. The declaration issued by Mr Lotz was most likely issued by mistake. This meant that it was not possible to apply the valuation standards that relate to predevelopment projects to value the Garatouw Project.

29. This is because the relevant valuation codes require an approved expert to issue a formal opinion declaring that it was technically achievable and economically viable to develop the site into a mine capable of producing quantities of ore that would generate cash flows that could be used to support a valuation.

30. Although Mr Van Zyl was unable to trace the declaration of the Mineral Reserve, he premised his assessment of values on the basis that even though there was no official declaration, it did not mean that a mineral reserve did not exist.

31. However, the court held that it can only proceed on the basis of reliable evidence[12] and had no choice but to reject Mr Van Zyl's evidence because there was (after an exhaustive analysis of the historical progress of the feasibility reports) no evidence that a Mineral Reserve had been declared that would qualify under any of the relevant valuation standards.

32. However, this finding does not lead to the conclusion that Mr Van Zyl's evidence was somehow 'extraneous' to the issues to be decided in the case, or that it was somehow unreasonable for the plaintiffs to rely upon it. Mr Van Zyl is a highly qualified and experienced mining engineer and mining valuation specialist.

Ms Wright's evidence

33. Ms Wright did not rely upon Mr Van Zyl's evidence, although she said that Mr Van Zyl's assessment was consistent with her own conclusions. In summary, Ms Wright's evidence was based on the feasibility models created by the company which had been in turn been premised on the Venmyn Deloitte valuations and the Dyson model which had also been commissioned by the company, from which she developed her own financial model. Ms Wright assumed that the information contained in the studies and materials provided by the company were accurate and reliable, particularly since she was not provided with the underlying materials on which those models and forecasts had been based. These source materials were all created or commissioned by the company and relied upon by the company.

34. As already noted, the company itself approved and relied upon the Venmyn Deloitte reports for reporting purposes and adopted them when supporting the financial statements and gave appropriate representations to the auditors as to their accuracy. The audited financial statements were never withdrawn or qualified to suggest that the Venmyn Deloitte valuations were based on a mistaken assumption.

35. For the same reasons explained above, none of the detailed work prepared by Ms Wright in assessing the proper approach to valuation was 'extraneous' or irrelevant to the main issue to be decided in the case, nor was it improper or unreasonable for Ms Wright to rely upon the company's own documented assessment of the value of the Garatouw Project in putting

[12] Judgment at pparagraphs 261-4.

forward the DCF model as a basis for the appraisal of fair value. She was entitled, in my view, to assume that the information contained in the company's financial materials was true and accurate for the purposes of preparing their assessment of the appropriate valuation methodology to adopt.

36. As the colloquial saying goes, it is a bit rich for Mr Lilly KC to suggest that the plaintiffs should be penalised for relying on materials which the company had itself relied upon and provided to the plaintiffs. In my judgment, there is no principled justification to deprive the plaintiffs of their costs on the basis that the company had (in effect) misstated the true position in its financial statements. In my view, ordinary common sense and basic fairness requires the court not to penalise the plaintiffs for relying upon the company's own financial statements and the source materials that were said to support them. For these reasons the court does not consider it appropriate to discount the award of costs to the plaintiffs at all.

37. Therefore, independently of the analysis of the exceptions to the general rule set out above under RSC Order 62 Rule 3 (3), in the exercise of the court's overall discretion under RSC Order Rule 2 (4), the court considers that the just and fair order in all the circumstances is that the plaintiffs are entitled to their costs of the proceedings, including the costs of the experts up to and including trial, to be taxed on the standard scale if not agreed and with a certificate for two counsel.

The disclosure application

38. The company applied for disclosure of the documentary materials that related to the engagement of the plaintiffs' lawyers because of a concern that the plaintiffs' lawyers had entered into an arrangement as to the payment of costs which was unlawful or which impinged upon the indemnity principle. The court allowed that application for reasons set out in a short Ruling[13].

39. The result of the court's order was that disclosure was given by the plaintiffs, and the fact that there had been an element of success fee included in the arrangement between the plaintiffs and their Australian lawyers was disclosed, contrary to certain representations that had been made.

40. The company seeks an order for the costs of the disclosure application on the basis that the application was a discrete application that arose after the determination of the case and related exclusively to the costs aspect of the case. Mr Lilly KC said that the company was entitled to the disclosure, the plaintiffs refused to give it until ordered to do so by the court. Mr Lilly KC relied on the 'costs follow the event' principle for this aspect of his submissions.

41. Mr Lowe KC responded that whatever the result of the disclosure application, no complaint was in fact actually made about the fee arrangements at the costs hearing, so the disclosure application led to nothing. Mr Lowe KC submitted that there should be no order for costs in relation to the disclosure application.

[13] [2025] SC (Bda) 84 civ.

The court's assessment

42. It is worth recalling that the premise of the application for disclosure was that the basis of the plaintiffs' representation had always been an issue in the case, and the company submitted that this matter had to be resolved before the court could properly and fairly address the question of how the costs should be awarded. The court agreed that disclosure should be given and agreed with the company that the plaintiffs ought to have provided it voluntarily.

43. The disclosure revealed that there had been an element of success fee in the terms on which the plaintiffs' Australian lawyers were engaged, but no point was ultimately taken in relation to that as being impermissible under Bermuda law or that there was any consequence that flowed. The success fee element in the fee arrangements with the Australian attorneys did not undercut or disentitle the plaintiffs to their costs under the indemnity principle. There is nothing champertous or impermissible in the arrangement, and the company rightly did not pursue any objection on the basis of it.

44. Although the court would normally be sympathetic to the submission that because the company's application was successful it attracts the costs follow the event principle, in my view that is not the appropriate lens through which to view the present application. The purpose for which the application was made was to enable the company to advance arguments at the costs hearing that would have affected the court's decision on costs. That is why the court reserved the costs of the application to the hearing on costs.

45. While the disclosure application was 'successful', it was not an end in itself; it related to supporting the company's stance on costs overall. The disclosure obtained did not advance the company's case on costs in any material respect and did not vindicate the company's substantive position on costs. It is difficult see that success on the disclosure application justifies an award of costs independently from the determination of the costs of the proceedings, on which the company comprehensively lost.

46. The court is also cognisant that the disclosure application delayed the ultimate determination of the costs issue by many months as a result of a disclosure application that was, in the end, unnecessary. The court is also mindful of the duty to exercise its powers and discretions in relation to costs in a proportionate way.

47. Taking matters in the round, and applying a proportionate approach, and recognising that the plaintiffs ought to have given the disclosure without being ordered to do so, the court considers that it is just and fair that in all the circumstances that there should be no order for costs in relation to the disclosure application.

Order

48. The plaintiffs' attorneys are to draw an order reflecting the terms of this Ruling in agreed form in the usual way.

Dated this 30th day of June 2026

SIGNED

THE HON. MR. JUSTICE ANDREW MARTIN

PUISNE JUDGE OF THE SUPREME COURT