

# COURT OF APPEAL FOR ONTARIO

CITATION: Aga v. Ethiopian Orthodox Tewahedo Church of Canada,  
2020 ONCA 10  
DATE: 20200108  
DOCKET: C66733

van Rensburg, Paciocco and Thorburn JJ.A.

BETWEEN

Teshome Aga, Yoseph Beyene, Dereje Goshu,  
Tseduke Gezaw and Belay Hebest

Plaintiffs (Appellants)

and

Ethiopian Orthodox Tewahedo Church of Canada,  
also known as St. Mary Cathedral, and Mesale Enegada,  
and Abune Dimetros and Hiwot Bekele

Defendants (Respondents)

Anthony Colangelo, for the appellants

Gordon E. Wood, for the respondents

Heard: November 22, 2019

On appeal from the order of Justice Sandra Nishikawa of the Superior Court of  
Justice, dated February 26, 2019.

**Thorburn J.A.:**

## OVERVIEW

[1] The appellants, Teshome Aga, Yoseph Beyene, Dereje Goshu, Tseduke Gezaw, and Belay Hebest (“the appellants”), are five former members of the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (the “Congregation”). The appellants were expelled from the Congregation.

[2] The appellants claim they were given no particulars of the allegations against them leading to their expulsion, no opportunity to respond to the allegations, and no opportunity to make representations in respect of their expulsion. They claim this was in breach of the rules governing the Congregation.

[3] The appellants therefore brought an action against the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral, which is incorporated under the *Corporations Act*, R.S.O. 1990, c. C.38 (the “Church”), as well as members of its leadership, including Messale Engeda<sup>1</sup>, Abune Dimetros, and Hiwot Bekele (together referred to as “the respondents”). The appellants claim, “The Church failed to follow their own internal procedures” in deciding to expel them from the Congregation and their right to natural justice and freedom to practice their

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<sup>1</sup> Messale Engeda indicated in his affidavit that his name has been misspelled in the order. However, there has been no motion to amend, so the title of proceedings will remain as stated in the order below.

religion as set out in s. 2(a) of the *Charter* was violated in expelling them from the Congregation.

[4] In their Further Amended Statement of Defence, the respondents pleaded,

[T]he Church is a voluntary association, the members of which acquire no civil or property rights by virtue of becoming members. Accordingly, [the appellants] had no freestanding right to procedural fairness with respect to the manner in which they were expelled from membership, and the decisions to expel are not subject to review by a court of law.

[5] The respondents brought a motion for summary judgment claiming there is no genuine issue requiring a trial and there are no rights to be enforced, as there is no underlying contract or other civil right.

[6] The motion judge held there was no underlying contract and therefore no justiciable issue in respect of the claim that the respondents failed to follow internal church procedures in expelling them. She therefore granted the motion for summary judgment.

[7] The appellants claim the motion judge erred in granting the motion for summary judgment, as the Constitution and By-Laws have provisions governing disciplinary measures that are contractually binding and enforceable, and there is therefore a justiciable issue to be tried.

[8] For the reasons that follow, I would allow the appeal and set aside the dismissal of the claim.

## **BACKGROUND FACTS**

### **A. CHURCH MEMBERSHIP, RIGHTS, AND OBLIGATIONS**

#### **(1) Organization of the Church and Congregation**

[9] The Ethiopian Orthodox Church of Canada St. Mary Cathedral is a corporation without share capital, incorporated under Part III of the *Corporations Act*. Its objects include a provision, “To solicit and receive donations, bequests, legacies and grants and to enter into agreements, contracts and undertakings incidental thereto.”

[10] The appellants are not members of the corporation.

[11] However, the appellants and the Church corporation were members of the Congregation which is a voluntary association governed by a Constitution and By-Laws. This Congregation is a local branch of the Ethiopian Tewahedo Orthodox Church, which has parishes around the globe.

#### **(2) The Constitution**

[12] The 1977 Constitution is in Amharic and no translation was provided. The Revised Constitution in English did not come into effect until July 2017, two months after the appellants were expelled from the Congregation.

[13] The Revised Constitution is not a direct translation of the 1977 Constitution, as it includes many revisions and additions. However, two relevant provisions in

the Revised Constitution, according to the respondents, are also in the Constitution albeit the section numbers are different.

[14] A chart provided by the respondents that compares the provisions in the 1977 Constitution and the Revised Constitution, provides that Article 61 of the Revised Constitution corresponds to Article 53 of the Constitution, both of which deal with “Rights and obligations of the faithful at parish church”. Similarly, Article 63 of the Revised Constitution corresponds to Article 54 of the Constitution, both of which deal with “Verdict against those who trespass this bylaw and the order of the church [in general]”.

[15] Article 61 of the Revised Constitution provides that “Every faithful must abstain from committing acts violating the moral values of the church and its rules and regulations; the follower is obliged to respect and uphold church rules and Holy Scriptures.”

[16] Article 63 of the Revised Constitution provides that:

5. When any follower is found in violation of the provision under Article 61, section 2 of the Ecclesiastical Constitution (Qale Awadee):

- A. First, advice and education will be given by spiritual father or church representative;
- B. Secondly, consultation and canon will be given;
- C. On the third time, temporary suspension from membership with warning.

6. The decision on cancellation of membership of faithful shall be effective only upon examination by special council and approval by the diocese archbishop.

### **(3) The By-Laws**

[17] The By-Laws are “promulgated to legally and unitedly administer the Ethiopian Orthodox Tewahedo Church in the Diaspora.”

[18] The objectives of the By-Laws are to “ensure that the rights of the clergy and laity are fully respected and to aim for the best interest thereof in consonance with laws of countries where they reside.”

[19] Article 44.1.a of the By-Laws provides, “In accordance with Ch. 7 article 53:1 of the ecclesiastical constitution and under the provisions of parish regulations, the rights of the laity, organized as parishioners, shall be fully respected.”

[20] Article 47 of the By-Laws addresses “disciplinary measures” including: (a) advice, warning or financial penalty (Article 47.1.a); (b) loss of membership status (Articles 47.1.b and 47.1.c); and (c) excommunication (Article 47.2).

### **(4) Expulsion of the Appellants from the Congregation**

[21] The appellants completed and submitted membership application forms in order to become members of the Congregation. They provided their personal information and the amount they committed to pay by way of monthly contribution

to the parish. The application form made no mention of the Constitution or By-Laws.

[22] The appellants had been members of the Congregation for over two decades when they were asked to be part of a committee to investigate an alleged heretical movement within the church community. The appellants were appointed along with six other members, including Archbishop Abune Dimetros and Head Priest Messale Engeda.

[23] The Guidelines of the committee provide that “[t]he committee will be guided by the rules and regulations of the Eastern Orthodox Tewahedo Church synod in the Diaspora”. The signatures of four appellants, Teshome Aga<sup>2</sup>, Yoseph Beyene, Tseduke Gezaw, and Belay Hebest, are on the Guidelines.

[24] Several more members were added by the time the investigation report was finished. The committee made several findings. All members of the committee, including the Archbishop, signed their names beside the findings of fact. The report was submitted to the Archbishop as required by the Guidelines.

[25] The recommendations of the committee in the report were not implemented by the administration of the diocese.

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<sup>2</sup> Note that the named party in this litigation is Teshome Aga. The translated copy of the Guideline says “Teshome Telila” and the warning letter is addressed to “Teshome Tessisa”. It appears that the discrepancies in the surname may be due to different translations from Amharic, as it is agreed by all parties that all five appellants were in the investigation committee.

[26] The appellants were not satisfied, and a dispute arose.

[27] On October 26, 2016, Messale Engeda sent a letter to each appellant, warning them that steps would be taken to expel them if they did not cease expressing dissatisfaction with the Archbishop Dimetros' decision.

[28] On May 23, 2017, each of the appellants received a letter from Archbishop Dimetros, which provides that "according to the bylaw of our Church chapter 57, article 4 and chapter 55, article 1 you have been suspended from your membership of Toronto St. Mary Cathedral". The content of By-Law chapters 57 and 55 were not included in the material before the court.<sup>3</sup>

[29] The following day, legal counsel for the Church wrote to each appellant to advise that "the requisite steps have been taken to have you expelled from the Church". No further particulars were provided in respect of the steps taken to have the appellants expelled.

### **THE MOTION JUDGE'S DECISION**

[30] After their expulsion, the appellants commenced an action against the respondents, seeking *inter alia*, a declaration that the decision to expel them was null and void and that the findings of the committee were valid and enforceable.

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<sup>3</sup> On the record before us, the By-Laws only have 12 chapters.



[31] In the motion for summary judgment, the respondents claimed the court had no jurisdiction to review the Archbishop's decision to suspend and then expel the appellants from the Congregation, as there was no contract between the parties.

[32] The appellants opposed the respondents' motion for summary judgment, claiming there were internal procedures governing the relationship between the Church, its leadership, and the members of the Congregation, and that the respondents failed to follow these procedures.

[33] The motions judge considered the evidence submitted by the parties and assessed that evidence. She held that:

Neither the Constitution nor the By-Law constitute a contract between the Plaintiffs and the Church. An essential element of a contract is a mutual intent to be bound to its terms. The Plaintiffs were not aware of the By-Law or the terms until this proceeding.

...

While members of the congregation are required to complete an application form, it does not mention being bound to the By-Law.

...

While the Plaintiffs may be members of the Church's congregation, they are not "members" within the definition of [section 121] the *Corporations Act*, and do not acquire rights under the Act.

...

The Plaintiffs have not alleged any particular provisions of the Constitution to support their claim.

[34] She concluded that this case was analogous to the Supreme Court of Canada's decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, where the court held that, as a general principle, judicial review is not available for the decisions of voluntary religious organizations absent the existence of an underlying legal right.

[35] The motion judge held that, in essence, the appellants were seeking to remedy what they alleged were breaches of procedural fairness, which they could not do, as she found there was no underlying contract or other right between the parties. As such, she granted the motion for summary judgment dismissing the appellants' claim.

## **THE STANDARD OF REVIEW**

[36] On a motion for summary judgment, where there is an error of law, the standard of review is correctness: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Absent an error of law, the standard is that of palpable and overriding error, as the exercise of the summary judgment rule attracts deference: *Hryniak*, at para. 81; *Housen*, at para. 36.

## **THE ISSUES**

[37] The issues raised on this appeal are:

- a) When are the rights and obligations of members of a voluntary association contractual?
- b) If there is a contract, does the contract provide a process for expelling the appellants from the Congregation and were any of those contractual provisions breached?

[38] The first issue is a legal issue for which the standard of review is correctness. The second issue is a question of mixed fact and law for which the standard of review is palpable and overriding error.

## **ANALYSIS**

### **ISSUE ONE: WHEN ARE THE RIGHTS AND OBLIGATIONS OF MEMBERS OF A VOLUNTARY ASSOCIATION CONTRACTUAL?**

#### **(a) Jurisdiction to Address the Affairs of a Voluntary Association**

[39] Adherence to a religious organization alone is not enough to create a contract. Jurisdiction to address a voluntary association's adherence to its own procedures and, in some cases, the fairness of those procedures depends on the presence of an underlying legal right to be adjudicated, such as a property or a civil right in contract or tort. As noted in *Wall*, at para. 24:

[T]here is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a

legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.

[40] Voluntary associations do not always have written constitutions and by-laws. But when they do exist, they constitute a contract setting out the rights and obligations of members and the organization. In *Ahenakew et al. v. MacKay et al.* (2004), 71 O.R. (3d) 130 (C.A.), at paras. 20 and 26, this court affirmed that voluntary associations are “a complex of contracts between each and every other member. The terms of these contracts are to be found in the constitution and by-laws of the voluntary association.”

[41] Once it is established that a contract exists, an expectation of procedural fairness may attach as a way of enforcing the terms of a contract: *Wall*, at para. 26. The requirements of procedural fairness depend on the circumstances, including the nature of the organization and the seriousness of the consequences of discipline. However, the basic requirements include: notice, opportunity to make representations, and an unbiased tribunal: *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at p. 195.

[42] In *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555, the Supreme Court of Canada considered the rights of a member of a real estate board who was expelled from the organization, resulting in a loss of access to services

available to members. The expelled member sued in contract and in tort. Beetz

J. held, at p. 566-567, that when an individual joins a voluntary association:

he accepts its constitution and the by-laws then in force, and he undertakes an obligation to observe them. In accepting the constitution, he also undertakes in advance to comply with the by-laws that shall subsequently be duly adopted by a majority of members entitled to vote, even if he disagrees with such changes. Additionally, he may generally resign, and by remaining he accepts the new by-laws. The corporation may claim from him arrears of the dues fixed by a by-law. Would such a claim not be of a contractual nature? What other basis could it have in these circumstances? In my view, the obligation of the corporation to provide the agreed services and to observe its own by-laws, with respect to the expulsion of a member as in other respects, is similarly of a contractual nature. [Emphasis added.]

[43] In other words, whether or not a member has specific knowledge of or expressly consents to the specific terms in the by-laws, becoming a member of a voluntary association entails agreement to the terms of the constitution and bylaws. As such, members of the voluntary association, including the organization itself, are bound by the terms in the constitution and by-laws and there is an obligation on the part of an organization to observe its constitution and by-laws.

#### **(b) Application of the Law to the Facts in this Case**

[44] The central issue on this appeal is whether the motion judge was correct in holding there was no underlying contract and therefore no genuine issue requiring a trial.

[45] Where there is an underlying contract, this court has jurisdiction to determine whether the rules of a voluntary association have been observed: *Wall*, at para. 37; *Hofer*, at p. 175.

[46] In this case, the appellants were not simply adherents of the faith. They applied to be members of the Congregation and offered consideration in the form of monthly payments. They completed the required membership forms.

[47] Upon approval of their applications, the appellants became members of the Congregation. They entered into a mutual agreement to be part of the Congregation and abide by the governing rules, whether or not they were specifically aware of the terms.

[48] But on the record before us, there is evidence that the appellants would have been aware of the Constitution and By-Laws. As members of the investigation committee, the appellants were specifically advised that the committee “will be guided by the rules and regulations of the Eastern Orthodox Tewahedo Church synod in the Diaspora.” Four of the appellants, Teshome Aga, Yoseph Beyene, Tseduke Gezaw, and Belay Hebest, signed the guidelines specifically confirming their receipt and acceptance of this term.

[49] The rules governing the treatment and discipline of members are set out in the Constitution and the By-Laws.

[50] Article 61 of the Revised Constitution (Article 53 of the Constitution) provides that “the follower is obliged to respect and uphold church rules” and Article 63 of the Revised Constitution (Article 54 of the Constitution) sets out a procedure for dealing with members who are seen to have transgressed.

[51] Similarly, Article 44.1.a of the By-Laws provides that the rights of parishioners will be fully respected, and Article 47 of the By-Laws specifically addresses “disciplinary measures” including: (a) advice, warning or financial penalty; (b) loss of membership status; and (c) excommunication.

[52] As noted by the Supreme Court of Canada in *Senez*, at pp. 566-567, “the obligation of the corporation to ... observe its own by-laws, with respect to the expulsion of a member as in other respects, is similarly of a contractual nature” and when an individual joins a voluntary association, that individual “accepts its constitution and the by-laws then in force, and he undertakes an obligation to observe them.”

[53] There is evidence of recognition by the Church and its leadership of its contractual obligations to abide by the rules when seeking to expel a member, including:

- a) inclusion of provisions in its Constitution and By-Laws to address discipline of its members;
- b) reliance on the By-Laws to suspend the appellants’ memberships; and

c) claiming that “requisite steps” were taken to have them expelled.

[54] In any event, based on the documents before this court, the only means of sanctioning members are as set out in the Constitution and By-Laws.

[55] The motion judge, therefore, erred in finding there was no evidence of an underlying contract between the parties.

**ISSUE TWO: DOES THE CONTRACT PROVIDE A PROCESS FOR EXPELLING THE APPELLANTS FROM THE CONGREGATION AND WERE ANY OF THOSE CONTRACTUAL PROVISIONS BREACHED?**

[56] As set out above, the Constitution and By-Laws include the rules that the Church and its leadership were required to follow in sanctioning members.

[57] Section 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that an appeal court may “make any order or decision that ought to or could have been made by the court or tribunal appealed from”, and s. 134(4) allows appeal courts “draw inferences of fact from the evidence”. However, based on the record before us, it is not possible to determine if there has been a breach of contract on the basis of failure to comply with the rules.

[58] It is not clear whether the respondents followed the provisions in the Constitution and By-Laws. The Constitution requires: advice and education; consultation and canon; and temporary suspension with warning before the cancellation of membership. The By-Laws outline disciplinary measures,



including: advice, warning or financial penalty; loss of membership status; and excommunication.

[59] Moreover, it is not clear whether the rules were followed when the Church and its leadership expelled the appellants because the respondents failed to adduce the following documentation:

- a) By-Law chapter 57, article 4 and chapter 55, article 1, pursuant to which the appellants' memberships were allegedly suspended (referred to in the May 23, 2017 letter from Archbishop Dimetros); and
- b) The steps the Church and its leadership took to expel the appellants (referred to in the May 24, 2017 letter issued by the Church's lawyer).<sup>4</sup>

[60] Furthermore, on cross-examination, the respondent Messale Engeda testified the "requisite steps" for expulsion were to ask the Archbishop, who then decides and notifies the person. He also said that there is a right of appeal to the Holy Synod upon expulsion – not just in cases of excommunication.

[61] In a summary judgment motion, the moving party bears the evidentiary burden of demonstrating that there is no genuine issue requiring a trial; it must

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<sup>4</sup> On January 11, 2017, the "Patriarch of Ethiopia", Abba Merkorios, sent a letter to the leadership of St. Mary Cathedral. In this letter, the Patriarch of Ethiopia confirmed that Archbishop Dimetros' decision with respect to his response to the investigation report was just. It says if anyone disdains the archbishop's directives, they will be "grouped with the gentiles". However, this letter is not specific to the expulsion of the appellants. In addition, they were not "grouped with gentiles" – they were expelled only from St. Mary Cathedral.

put its best foot forward by adducing evidence on the merits: *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at paras. 30-32, leave to appeal refused [2016] S.C.C.A. No. 443.

[62] The respondents failed to adduce information in their control in respect of the imposition of suspension and expulsion, how expulsion is defined in the Constitution and/or By-Laws, and how, if at all, expulsion differs from loss of membership.

[63] Despite this court's authority under r. 134(4) of the *Courts of Justice Act* to draw inferences of fact, given that the respondents have not filed the necessary evidence to enable this court to determine the rules of expulsion or whether they were followed, it is not possible to determine whether the contractual terms were breached.

[64] These are genuine issues to be determined.

## **CONCLUSION**

[65] For the above reasons, the appellants were subject to rights and obligations in contract upon becoming members of the Congregation. Those rights and obligations are set out in the Constitution and By-Laws. However, it is not clear whether, and if so, how those rights were breached, as the respondents have failed to provide all of the information in respect of the rules and the steps taken by the respondents leading to expulsion.

[66] I would therefore grant the appeal.

[67] I would set aside the order of the motion judge granting summary judgment, and return the matter to the Superior Court.

[68] Finally, I would award costs to the appellants of this appeal in the amount of \$5,000, as agreed by the parties. In view of the result, I would reverse the costs below.

Released: January 8, 2020 ("D.P.")

"J.A. Thorburn J.A."

"I agree. K. van Rensburg J.A."

"I agree. David M. Paciocco J.A."