From The Files of Bais Din

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Story is fictitious, written to illustrate the Halacha. In an actual case a Halachic authority should be consulted.

Chani is a talented shaitel macher who has built up her reputation over the past ten years and now has a large customer base. She needs to hire an assistant to help her since she is no longer able to keep up with all her customers. Like many business owners, she is worried that after training a worker and sharing all her business secrets, the employee will open her own business and potentially hurt Chani's bottom line. She downloads a standard non-compete contract which states: 'the employee agrees that he shall not compete with the employer's company for ____ years after cessation of employment within a _____ mile radius of the employer's business. If the employee should violate the agreement, the employer shall have the right to petition a court of competent jurisdiction to prevent further violations.'

After some searching Chani is ready to employ Devorah. The two woman review the employment contract, including the non-compete clause. Devorah signs a copy of the contract and hands it to Chani. The non-compete clause doesn't bother Devorah at all. She is a young newlywed and is happy to have found a good job she will enjoy in her new hometown. The two work together very nicely for five years. Devorah's family grows and she is a proud mother of three young children.

Tragically Devorah's husband suddenly gets very ill and passes away. She is now left with three young children to care for all by herself. She continues working for Chani for a few months, but soon realizes that she cannot make ends meet if she continues to work as an employee. She has the expertise to open her own business and sees this as her only option. Devorah informs Chani of her plans to leave at the end of the month. In the course of their conversation she shares her difficult financial situation, and her plans to open her own business. Chani is completely unprepared for this and is extremely hurt. She runs to her office and comes back with their contract. Putting the non-compete clause in front of Devorah, she blurts out, "I hope it will not be necessary for me to take you to court." Devorah is surprised by her boss's strong reaction, but she maintains her composure and replies, "I was sure you would be able to understand my situation. I see now that this is not the case. I'll gladly go to Bais Din if that's what you demand". Chani responds, "I don't think that Bais Din would be the appropriate court in this case. The contract gives me the right to petition a court of competent

jurisdiction that has the power to prevent violations. I'm going to need a court that is part of the United States legal system." Devorah insists that the Torah forbids us from going to a non-Torah court. Reluctantly Chani calls her Rov who confirms that it is strictly prohibited for a Jew to take a fellow Jew to a non-Jewish court[1].

And so, the next week the two women arrive in Bais Din. The Bais Din asks Chani to present her claim and Devorah to state her defense. After hearing both sides, the judges discuss the case and arrive at a ruling.

The Av Bais Din (head Judge) begins. "The claim that was presented here today is regarding a non-compete contract which states that 'the employee agreed that she shall not compete with the employer's business.' In Torah law, a contract, in which one accepts *not* to do something, is no more binding than a verbal commitment[2]. Let us try to understand what the Torah teaches us about this matter.

There is a mitzvah from the Torah of הין שלך צדק. This Mitzvah is interpreted by the Chachomim to mean that when one says he will or will not do something, he is obligated to fully intend to keep his word[3]. If at the time when one gives his word he truly means to follow through, but he later changes his mind, he is not in violation of this positive commandment. The Rabbis, none the less, consider a person who does not stand by his word when someone is counting on him to be an untrustworthy person[4]. However, when an unforeseen or unexpected change in circumstance happens after the commitment is made, retracting one's word is not seen as a lack of trustworthiness[5]. Even if one did transgress the Mitzvah of הין שלך צדק, or is acting in an untrustworthy manner, the Bais Din cannot force him to honor his word[6].

In our case, Devorah did not intend to open her own business at the time she signed the contract, and she is only asking to do so now due to the loss of her husband. According to what we just explained, no transgression is being violated and Devorah is

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[1] חו"מ סימן כו' סעיף א

[2] דהוי קנין דברים בעלמא, כבסימן קנז' סעיף ב' שאפילו עשו שותפים קנין לחלוק יכולים לחזור דהוי קנין דברים. ואף דשם בסעיף ד' הרמ"א מביא מחלוקת אי עשו קנין ליבנות אי הוי קנין דברים או לא, וכן בסימן רמה' סעיפים א – ב, זה דווקא היכא שבא לחייב עצמו בדבר דאיכא למימר שכוונתו לשעבד גופו ונכסיו. אבל היכא שמקבל קנין שלא לעשות דבר הוי סילוק שיעבוד ולא מהני לכולי עלמא. הכי פסק הרמ"א סימן רג' סעיף א מתשובת הרשב"א. הכי מפרש הגר"א שם ס"ק ט' דהרמ"א פוסק דאף להסוברים דקנין אתן מהני קנין שלא לעשות לא מהני. וכן הט"ז שם ד"ה ע"ש בהג"ה מי שקנו סובר הכי וכוותיה נקטו האורים סימן י"ב ס"ק יג' והנתיבות שם חידושים יג'. דלא כהסמ"ע שם ס"ק כ' עיי"ש.

[3] בבא מציעא דף מט. הין שלך צדק וכו. שיהא הן שלך צדק ולאו שלך צדק. ופירשו אביי שלא ידבר אחד בפה ואחד בלב. והנמוקי יוסף דף כט: מפרש דפסקינן כאביי מדהביאו הרי"ף, והפרישה סימן רד' ס"ק יא' ד"ה וכתב בעל המאור מביאו.

[4] סימן רד' סעיפים ז – יא. מבואר שם דכל היכא שסומך חבירו על דיבורו מיקרי מחוסר אמנה אם חוזר בו.

[5] בסימן רד' סעיף יא' הרמ"א מביא שתי שיטות אם בתרי תרעי הוי מחוסר אמנה. דהיינו אם היסכם לקנות ואחר כך נשתנה השער ולכן רוצה לחזור אי הוי מחוסר אמנה. והרמ"א מסיק דנראה עיקר כהסוברים דהוי מחוסר אמנה. הש"ך שם ס"ק ה' מביא דהב"ח מסופק היכי פסקינן, והערוך השולחן סוף ס"ק ח' מסיק וז"ל ונראה דמדינא ודאי אין בזה משום מחוסר אמנה רק ממידת חסידות. וכל זה בתרי תרעי דהוי דרך העולם שיש שינוי בשער, אבל היכא שהיה שינוי שלא עלה על דעתו כלל שיקרה אולי לכולי עלמא לא מיקרי מחוסר אמנה. והכי משמע מהט"ז יו"ד סימן רסד' ס"ק ה'. דהרמ"א פסק שם דאם נתן כיבוד של מילה לאחד אסור לחזור בו. והט"ז כתב דאם נזדמן לו אחר כך מוהל שהוא אוהבו או צדיק ליכא מחוסר אמנה.

[6] סימן קפט' סעיף א' ועוד הרבה מקומות.

not acting in an untrustworthy manner. She is permitted to open her own wig business."

Chani thanks the Bais Din for explaining to her what the Torah teaches regarding her case. She is very relieved that she took her case to Bais Din and was saved from causing any further pain to Devorah. (Look at the beauty of a Torah observant Jew! She's not disappointed about 'losing' the case, she is so happy she was saved from inadvertently violating the Torah and hurting another Jew!)   She asks the Av Bais Din, "Before I go, may I please ask if there is any way to write a non-compete contract that would be Halachicaly binding?"

The Av Bais Din responds, "A possible method would be to create a deterrent by requiring that the employee accept on herself a significant penalty that she will have to pay if she should compete. The Torah *does* recognize acceptance of a monetary obligation[7]. The non-compete could therefore have a clause that if the employee competes in the future, she obligates herself to pay a large sum of money to the employer. Such an obligation, if written properly, is enforceable by Bais Din and should serve as a significant deterrent to keep the employee from competing."

"That method would work for me," Chani responds, "But can you explain why you said, 'If the obligation is written properly?'" What is the proper way of writing that obligation?"

The Av Bais Din explains, "There is a significant problem that must be properly dealt with in order to use this method I'm suggesting. Since the penalty is conditional, it is considered to be an אסמכתא and is not binding. The idea behind אסמכתא is that in order for a personal liability to be binding, there has to be full resolve to assume the liability at the time when it is undertaken. If liability is accepted conditionally, the Torah assesses that full resolve is not in place.   In the case of the non-compete agreement, the employee does not really think that the penalty will ever come to be. He only accepts it in order to make the employer confident that he is serious in his commitment not to compete[8].

However, if a conditional penalty is undertaken in front of a Bais Din Chashuv (literal translation: important, see footnote)[9], then it shows that the employee has full resolve to accept the liability[10]. When someone is in front of Bais Din we assume that he fully means to accept upon himself what he says."

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[7] סימן מ' סעיף א'

[8] מבואר בסימן רז' סעיף יג'

[9] There are a few opinions brought by the Rema 207:15, as to what the interpretation of Bais Din Chashuv is.   One interpretation is a Bais Din that is fluent in the laws of אסמכתא. A second interpretation is the top Bais Din of the city. See the Rema for a third interpretation.

[10] סימן רז' סעיף טו'. ושם איתא מחלוקת מחבר ורמ"א אי גם בעי למתפס זכויותיו בבית דין כדי שלא יהא אסמכתא. המחבר סובר דצריך והרמ"א מביא דיש אומרים דאף בלי התפיס זכויותיו מהני. ומסיק שהרא"ש כתב שהכי נהיגי עלמא.

"So you're saying that in order for me to be able to write a non-compete that is binding, I have to come to the Bais Din each time and have my employee accept the penalty in its presence? I suppose that it would not be too hard for me since I don't hire a new worker very often. But wouldn't it be a little difficult for a larger company to have to come to Bais Din each time they hire someone?"

"There is a method that would not necessitate coming to Bais Din. There is a principle of הודאת בעל דין כמאה עדים דמי, the admission of a litigant is like one hundred witnesses. This means that if the litigant himself admits to something which gives him greater liability, it is as though there are one hundred witnesses testifying to what he is admitting to. The Rema applies this rule to אסמכתא by ruling that if the contract says that the employee admits that the liability was undertaken in front of Bais Din, it is as if there are a hundred witnesses that saw him do so. That being the case, if a Bais Din were to rule regarding this case in the future, they would consider the liability to have been undertaken in front of a Bais Din and therefore to be binding[11].

There are opinions that have additional requirements to make an אסמכתא agreement made in front of Bais Din binding, but those are not practical for a non-compete agreement[12]. However, we can still make the deterrent binding even according to these opinions, since they have a different ruling regarding conditions that are an אסמכתא, which can be applied in this case. They rule, that if it is stated that the monetary obligation is undertaken to be effective immediately, but will only have to be paid if the condition is ever met in the future, it would be valid. Putting both opinions together, one could use the following clause to create a deterrent which is enforceable by Bais Din, and would effectively make the non-compete agreement binding[13].

The employee agrees that he/she shall not compete with the employer's company for ____ years after cessation of employment within a _____ mile radius of the employer's business. If the employee should ever compete, he accepts upon himself a monetary obligation of $_______, which is effective from the time this document becomes binding. The employee admits that this obligation was accepted with a proper Kinyan and was undertaken in front of a Bais Din Chashuv. The employee agrees to abide by the opinions

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11 שם ברמ"א. ובסמ"ע שם ס"ק מב' כותב דמבואר מלשון הרמ"א דאפילו אם ידענו שבאמת לא קיבל בבית דין מהני. וטעמו משום דכיון שכתב בשטר שחייב עצמו בבית דין זה מראה שיש לו גמירות דעת לחייב עצמו. והנתיבות חידושים מה, והערוך השולחן ס"ק מד פוסקים כמותו.

12 כמבואר בהערה 9 דלמחבר בעי שגם יתפוס זכויותיו בבית דין. וממילא בנידון זה היה צריך לתת את כל סכום הקנס ביד הבית דין.

13 סימן רז' סעיף יד'. למחבר מהני אי קנה מעכשיו דלא ליהוי אסמכתא, והרמ"א שם אף שחולק עליו דלא מהני מעכשיו לחוד אבל כתב דבעי בית דין חשוב ומעכשיו. והסמ"ע ס"ק מ רצה לידחוק שהרמ"א לא היצרך שניהם, אבל הט"ז ונתיבות מביאו חולק עליו דבעי שניהם. ולמעשה איך שיהיה בשיטת הרמ"א כדי שלא יוכל לומר קים לי כהמחבר בעי לכתוב שניהם. ועל פי זה כתבתי בפנים דכדי לצאת ידי כולם בעי לכתוב גם מעכשיו.

that rule that this obligation was undertaken with full commitment and is not an אסמכתא."

"Thank you very much," Chani says. "I wrote down the entire text and will use it next time it is needed."