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Restoring the Primacy of Choshen Mishpat

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STORY LINE

by Rabbi Meir Orlan

Halacha Writer for the Business Halacha Institute

A Lost Cap

Chaim and his wife were visiting Israel and enjoying an afternoon with their grandchildren in the park. After pushing them on the swings, they went to sit down on a bench in the corner of the park.

Chaim noticed a cap lying on the bench.

He turned to his wife and asked, "Should I take the cap home and try to return it to its owner?"

"How will you return it?" she asked.

"I'll put up a sign in the nearby shul," Chaim replied.

"Who says that the person who lost the cap attends that shul?" she said.

"I could also put up a sign on the bulletin board in the park," suggested Chaim.

"That's a good idea, but signs on bulletin boards tend to get covered or torn down after a short time," his wife responded. "Anyway, the person who lost the cap may not

even bother to look at the bulletin board. He might simply check the bench and assume that someone walked off with his cap. Maybe it's best to leave it here and hope that the owner will come back in the next day or two."

"What about the mitzvah of hashavas aveida (returning lost items)?" protested Chaim. "I'm not allowed to ignore a lost item."

"I know that, but we've amassed a whole collection of lost caps, yarmulkes and shirts over the years," she said. "Almost no one has ever called to claim anything, other than a couple of valuable items. I almost feel that by taking the cap you're doing the owner a disservice. If you leave it, maybe he'll come back and find it."

"I know what you mean, but I don't think the laws of hashavas aveida allow that," replied Chaim. "I wouldn't do that without consult-

ing Rabbi Dayan."

Chaim called Rabbi Dayan.

"I'm sitting in a public park and there is an unattended cap on the bench," he said. "Should I take it home and try to return it, or just leave it here?"

"The purpose of hashavas aveida is to ensure that a lost item returns to its owner," answered Rabbi Dayan. "Therefore, if an item appears to have been placed there intentionally, you should not touch it, but leave it where it is. The owner will likely come back and look for it there (C.M. 260:9)."

"What if I'm not sure whether the item was placed there intentionally?" asked Chaim.

"If you're unsure, the Rema (260:10) differentiates among three cases," explained Rabbi Dayan. "Each also depends on whether the item has a siman (identifying feature) or not."

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The Competition

I hired an employee and trained him in the details of my industry. After working for me for a couple of years, he opened his own business and became my competitor.

Q: Do I have the halachic right to prevent him from becoming my competitor, at least in the area where my business operates? What can I do to prevent a new employee turning into my competitor?

A: A former employee may start his own business and his former employer does not

have proprietary rights to the knowledge that the employee acquired while he was employed (cf. C.M. 156 5-7). Even an oral or written agreement between employer and employee that the employee not become his competition is not halachically binding. This is because an agreement for not doing an act - in this case, not to compete - is a kinyan devarim, an agreement that does not convey anything tangible (either monetary or in the form of a lien) to the other party. Such a kin-

yan does not take effect (Sema 245:2).

However, not honoring such an agreement may demonstrate a lack of trustworthiness, mechusar amanah, in that one is not following through with his commitment. An example of this violation is a commitment to purchase or sell, or a promise to give a gift. If the recipient had reason to assume that the commitment would be fulfilled (semichus daas), then one who does not follow through is mechusar amanah, even though he cannot technically

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"First case, where the item was left in a secure place, you should not touch it.

However, if you already took it home: If there is a siman you must publicize the item; if there is no siman you should hold it until Eliyahu Hanavi comes and clarifies whose it is.

"Conversely, if the place is not at all secure, the item should not be left there. If there is a siman, you should take it home and publicize it; if there is no siman you may keep the item.

"The third case is where the place is partially secure, such as your case. If there is a siman, the Shulchan Aruch, following the Rambam, rules that you should not touch the item, but the Rema and almost all other authorities rule that you should take it home and publicize it. If there is no siman, you should

leave the item there. Thus, it would seem that if the cap has a siman you should take it home and publicize it (Shach 260:24).

"Nowadays, though, people rarely search for signs on non-valuable items; it is unlikely that you will succeed in returning the cap," concluded Rabbi Dayan. "Therefore, HaRav Yo-sef Shalom Eliyashiv, zt"l, ruled that, nowadays, if the item is not valuable and might have been placed there purposely, even if there is a siman, it is preferable to leave the item; perhaps the owner will return to find it.

"Thus, you should leave the cap where it is.

"However, if the item were a valuable hat that the owner would search for and it had a siman, you should take it home and publicize your find (Hashavas Aveidah K'halachah 1:9)."

be forced to follow through on his commitment (C.M. 204).

A point subject to debate is whether one is considered mechusar amanah if he does not carry out a commitment that is not subject to kinyan, i.e. a non-compete commitment. One opinion is that mechusar amanah is limited to agreements that can be ratified with a kinyan; agreements that cannot be ratified with a kinyan are not subject to the prohibition of mechusar amanah (Teshuvah HaRosh 102:10).

Others contend that an additional distinction must be made between circumstances when there is reason to believe that the commitment will be fulfilled and those in which there is no reason to believe the commitment will be fulfilled. When the commitment is likely to occur (e.g. to give fruit that did not yet begin to grow), the recipient believes he will receive what was promised, and the

benefactor violates mechusar amanah if he does not fulfill his commitment. When the commitment is not likely to occur, the recipient does not expect to receive anything and the benefactor does not violate (Minchas Pittim 209).

Thus, there is a strong argument that although an employment contract may include a non-compete clause, the employee does not expect that it will ever be relevant and it is merely an asmachta (non-binding agreement), especially because a non-compete agreement is often challenged and even taken to court. It is therefore imperative that employers formulate a halachically binding non-compete clause. This can be achieved by including a penalty that will become activated in the event that the employee violates the clause, and which is drafted in a halachically enforceable manner.

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