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Can Agents Compete With Their Principals?

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Israeli courts periodically hear disputes arising from a business owner's desire to curb its competition. Protection from unfair competition is possible, inter alia, when it aims to protect a business's intellectual property assets such as a patent or trade secret, for example.
When it comes to competition by former employees, a non-compete clause which prevents an employee from working in his line of profession, without it protecting the legitimate and concrete interests of the employer, will be probably considered as not valid and will not suffice. A recent ruling was handed down in Israel, in an exceptional case where a business sought to prevent competition by someone who served as an agent on its behalf for years.

Let us first explain that principal-agent (or *agency*) relationships can be formed in any case where a person, the agent in the legal sense, receives permission to carry out activity on another's behalf, the principal. So, for example, a manager can be considered an agent of a company, an employee an agent of his employer, and any other person whom we call "agent" in common language, such as an insurance or actor's agent, can be considered an agent in the legal sense. An agent has a duty of loyalty to the principal, as stated in Israel's Agency Law. The Agency Law also lays out specific duties an agent has, like being prohibited from receiving benefits, misusing information or documents that reached the agent by way of his agency and having conflicts of interest between benefiting the principal and benefiting itself.

It is reasonable to assume with the above serving as background that agents competing with their principal will be considered to be in breach of the duty of loyalty to the principal and a conflict of interest in carrying out the act. Does this duty, however, also apply after the agency relationship has ended? In other words, may agents compete with their principals after their relationship has ended?

Israel's Supreme Court already ruled years ago that most of an agent's duties come to an end once the agency is over, aside from specific duties limited in scope which continue to apply also after the relationship has ended. Hence, even after the agency's conclusion, for instance, agents are under obligation to send principals benefits or information and documents that have been furnished to them in relation to the agency[1]. Does the commitment to not compete with the principal continue to apply as well?

The Tel Aviv-Yafo District Court recently handed down a ruling with respect to this question in *Touati*[2]. The case concerned a petition for temporary injunction temporary injunction prohibiting the respondent, who was claimed to have served as an agent for the petitioner, from competing with the petitioner by directly approaching its clients. The petitioner argued that the parties had an agency relationship before they had a falling out and that as part of this relationship the agent was exposed to different kinds of information the principal owned. The respondent for his part argued that the parties had established a joint business venture, such that they had equal status, the contribution from each of them to the joint venture was equal and the products from the venture did not belong solely to the petitioner.
In considering the request for a temporary injunction, the district court was open to assuming, for the sake

of rendering its decision, that there was indeed an agency relationship and went into the question of whether the agent has a duty not to compete with the principal's business also after the end of the relationship. The court concluded that there was not. The court emphasized that absent an agreement between the parties imposing upon the agent non-compete obligations after the parties' relationship has ended, limitations of this sort should not be imposed. The court further held that use of information acquired by one claimed to be an agent can be restricted if it is proven that this information belongs to the principal only. These matters should have been regulated in an agreement between the parties. The court ruled that the current case's circumstances are not conclusively indicative of the petitioner's (claiming to be the principal) ownership of the information produced throughout the parties' relationship.

The dispute underlying the *Touati* ruling joins a long list of disputes that could have been avoided had the parties properly prepared in advance and laid their relationship out in a written agreement defining the relationship between them (joint venture, agency, employment or other), regulating the effect of termination of their relationship (including an express non-compete clause) and relating to the ownership of and the right to use their intellectual property assets and those produced in the framework of their relationship.

To avoid circumstances such as these, it is recommended to seek advice from an experienced legal counsel who specialize in ventures and intellectual property (particularly knowhow- and technology-intensive ventures) starting at the venture's earliest stage.

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[1] See, for instance, CFH 1522/94 Neiger v. Mittelberg (published on Nevo 6 Feb 1996), sect. 20-25 of the rul. by Hon. Just. Strasborg-Cohen and sect. 8 of the rul. by Hon. Just. Heshin.
[2] CF (Tel Aviv District) 60879-08-18 MSIntelligence MSI Market v. Touati (published on Nevo 13 Sep 2018).