**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

**CASE NO: 143/05
Not reportable**

In the matter between

**DALEEN ALTA DE SWARDT** **Appellant**

**and**

**THE HOUSE OF TRUCKS (EDMS) BPK** **Respondent**

Coram**:** **SCOTT, CONRADIE, CLOETE, LEWIS, VAN HEERDEN JJA**

Heard: **17** March 2006
Delivered: 27 March 2006

*Summary: Oral contract for the manufacture of fuel tankers: guarantee for a year entitled the plaintiff to damages on breach.*

**Neutral citation: This case may be cited as *De Swardt v House of Trucks* [2006] SCA 33 (RSA).**

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**JUDGMENT**

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**LEWIS JA**

[1] The appellant in this matter, Mrs Daleen de Swardt, sued the respondent, The House of Trucks, for consequential damages resulting from the respondent's breach of a contract for the manufacture of a set of fuel tankers for her business, Leeukop Boerdery ('the business'). The appellant alleged that the contract had been concluded orally, over the telephone, between her husband acting on her behalf, and a representative of the respondent, Mr Louis van den Berg.

[2] The respondent denied the existence of any contract between the parties, but, in the alternative, relied on a quotation given to the appellant in respect of the tankers subsequent to the telephone conversations, and which expressly excluded liability for consequential loss. It pleaded that it had sold the tankers manufactured at the appellant's request to a finance house, SA Axle Finance (Edms) Bpk, trading as Planet Finance, which had in turn let the tankers to the appellant.

[3] The trial court (Free State High Court, per Beckley J) agreed at the outset to determine only the issues whether a contract between the parties had come into existence and if so, whether it excluded liability for consequential loss on the respondent's breach. Beckley J found that there had been a contract between the parties as alleged by the appellant; that the tankers were guaranteed for a period of a year, and that it had been in their contemplation that special damages would be payable in the event of failure to perform. However, he granted leave to appeal to the full court. That court (per Lombard J, Hattingh and Kruger JJ concurring) upheld the appeal on the basis that there had been no agreement of sale between the parties, and ordered that the trial court's order be replaced by one of absolution from the instance. Special leave was granted by this court to appeal against the decision of the court below.

[4] The basis of the claim as alleged in her combined summons is that the appellant's husband, Mr de Swardt, acting on her behalf, had concluded an oral contract with the respondent on 8 February 2001 to manufacture two sets of fuel tankers for the appellant's business. The price was agreed at R512 000 plus VAT. The respondent had undertaken to deliver the first set of tankers on

12 March. Van den Berg, for the respondent, had told De Swardt that the tankers would be under guarantee for a year. It appears, although the appellant's pleadings by no means make this clear, that the transaction was to be financed by Planet Finance, and that the purchaser of the tankers would be Planet Finance, which would in turn let them to the appellant.

[5] The agreement between the appellant and Planet Finance, annexed to the particulars of claim, is termed a 'lease agreement'. It was concluded with the appellant, trading as Leeukop Boerdery, as lessee on 26 April 2001, after the first set of tankers had been delivered to the business. The 'selling price' of the tankers is set out in the lease but no reference is made to the identity of the seller. The obvious inference to be drawn from the evidence, however, is that the respondent sold the goods directly to Planet Finance, which in turn let them to the appellant. Indeed, as I have indicated, the respondent pleaded that it had sold the first set of tankers to Planet Finance for R643 585 plus VAT.

[6] The contract between the parties was subsequently amended, the appellant alleged, by agreement between De Swardt and Mr Eduan Naudé of the respondent, so as to make provision for the installation in the tankers of meter and hydraulic pump systems. Subsequent to the amendment, a written quotation was sent to the appellant on 28 February 2001. Although the respondent denies that there is a contract between it and the appellant, it claims in the alternative that the terms of such an agreement are to be found in the written quotation rather than in any oral agreement. The quotation expressly excludes liability for consequential loss or damage.

[7] After the sets of tankers were delivered to the business they immediately manifested defects. Many unsuccessful attempts to repair them were made by the respondent. De Swardt also obtained a report to the effect that they did not conform with SABS specifications. De Swardt thus, on behalf of the appellant, cancelled the contract. The lease agreement was also cancelled and the tankers returned to the respondent. We are not concerned with the issue whether the tankers were indeed defective, or whether

cancellation was justified, because of the separation of issues by the trial court.

[8] The first issue to be determined then is whether there was a contractual relationship between the parties. The evidence of De Swardt, the only witness called in the case, was that he had decided to commence a petrol business on behalf of the appellant and needed fuel tankers for that purpose. He had telephoned Mr van den Berg of the respondent on 5 February 2001 and made enquiries about acquiring a set of Interlink tankers. He had asked about the price and Van den Berg had replied that it would be in the region of R600 000, and he would revert to him with a quotation. De Swardt had also indicated that he wanted the tankers urgently, preferably by the beginning of March in order to fulfil contracts that he had already concluded for the supply of petrol. Van den Berg had suggested that if he needed finance he should approach Planet Finance. De Swardt had followed up on the suggestion and had formally applied for financing on 9 February 2001.

[9] On 8 February Van den Berg phoned De Swardt (who noted the call in his diary) and said that the respondent could deliver the first tankers on 12 March and the second set a week later. Van den Berg also quoted a price of R512 000 plus VAT. The tankers were originally to be 'bottom-drop' without any meter system. That specification was changed by agreement with Naudé. Van den Berg had stated at the outset that the tankers would be guaranteed for a year. The first set of tankers was then manufactured by the respondent but delivery took place later than promised, on 7 April. The second set was delivered on 19 April. The tankers, testified De Swardt, had been unfit for use from the time of delivery.

[10] De Swardt's evidence was in no way controverted by the respondent. Although in cross-examination some attempt was made to suggest that no finality had been reached as to the terms of the contract during the course of the various telephone calls made, no evidence was led to gainsay it, and the very fact that the respondent commenced with the manufacture of the tankers soon after 8 February indicates that the contract for the manufacture of the

tankers with the specifications discussed telephonically was indeed concluded orally. The respondent did not pursue the contention in this court that there was no contract at all, nor that the written quotation had embodied the terms of the contract. The evidence that the respondent had undertaken to guarantee the tankers for a period of a year was also not controverted.

[11] This brings me to the second question. Was the respondent liable for what the parties termed 'consequential loss'? The evidence of De Swardt shows that the guarantee given by the respondent for a year was not simply a guarantee for the repair of the tankers. It would cover any loss caused by the breach of the respondent. Although it was argued for the appellant that there was also an agreement that 'consequential damages' would be recoverable, because the respondent knew that the tankers were needed to fulfil contracts for the transport of fuel at the time when the contract was concluded, in my view it is not necessary to show that any special damages were foreseeable or in the contemplation of the parties. The kind of loss alleged to have been suffered by the business is that which flows directly from the breach of the guarantee. Ordinary damages include loss of profits flowing from a breach. And since the guarantee was proved by the appellant she is entitled to claim any damages that she can prove resulted from its breach.

[12] Accordingly the appeal is upheld with costs. The order of the court below is replaced with the following:

'It is declared that there was a contract between the parties in terms of which the defendant would manufacture for the plaintiff two sets of fuel tankers, which would be under guarantee for a year. The plaintiff is entitled to claim any damages that flow from the breach of the guarantee.'

C H Lewis
Judge of Appeal

Concur:
Scott JA
Conradie JA
Cloete JA
Van Heerden JA