(1) Reportable: NO
(2) Of interest to other Judges: Yes/No
(3) Revised

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Signature Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: PA25/24

In the matter between:

BENTELER SOUTH AFRICA (PTY) LTD **Appellant**

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA) AND OTHERS **Respondents**

Heard: **25 November 2025**

Delivered: **30 January 2026**

Coram: **Mahalelo ADJP, Nkutha-Nkontwana JA *et* Chetty AJA**

JUDGMENT

CHETTY, AJA

Introduction

[1] This appeal lies against the decision of the Labour Court (Msizi AJ), with the leave of this Court, in respect of the dismissal of 30 employees, who at the time were

members of the Association of Mineworkers and Construction Union (AMCU) and the National Union of Metalworkers of South Africa (NUMSA). Their dismissals were found by the Labour Court to be substantively and procedurally unfair.[1] The underlying cause for their dismissal is located in a short work stoppage on 30 September 2020 as a result of confusion over the non-payment of a government allowance to workers during the COVID-19 pandemic.

[2] After two separate disciplinary enquiries for employees belonging to their respective trade unions, conducted by the same chairperson, both sets of employees were found guilty of the same count of misconduct related to the work stoppage on 30 September 2020. They were all dismissed on 26 March 2021.

[3] Following their dismissal, the consolidated group of employees referred a claim of an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA), seeking their reinstatement. The CCMA was unable to resolve the dispute, which was referred to the Labour Court for adjudication. The Labour Court in a judgment of 8 January 2024 held their dismissals to be procedurally and substantively unfair and ordered their reinstatement retrospective to 26 March 2021, including backpay. The appellant was ordered to pay costs. Leave to appeal was refused, but granted on petition to this Court on 4 February 2025 in respect of the whole of the judgment.

<u>Background</u>

[4] A brief background to the matter is required in order to place the events of 30 September 2020 in its proper context. The onset of the COVID-19 pandemic reached every facet of our daily lives, with the workplace being no exception. In South Africa, a State of National Disaster was declared by the government, with the result that many businesses stopped operating or did so with reduced staff. In order to ameliorate the impact of the pandemic on workers in particular, the government, through the Department of Labour, set up the COVID-19 Temporary

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[1] The names of the employees dismissed by the respondent appear in Annexure "A" to the Statement of Case. The list reflects the names of 33 employees. Three employees on the list were re-employed.

Employee/Employer Scheme (C19 TERS) for the period of March 2020 to 15 March 2021 to assist employers. The TERS benefit paid a limited portion of the salaries of employees where the employer had to close operations (completely or partially) due to the lockdown.

[5] The appellant, which is engaged in the manufacture of motor vehicle components, with its operations taking place in Kariega, in the Eastern Cape, was also a recipient of TERS subsidies from the government. On 26 May 2020, the employees at the appellant embarked on a work stoppage. According to the appellant, two stoppages occurred in May 2020[2] resulting in a written notice issued supposedly to all workers, although it was later argued that this notice served as a prior warning specifically to the employees who were ultimately dismissed on 26 March 2021. The notice was placed on the company notice board. It read as follows:

> 'Dear Employees,
>
> Due to recent unprotected industrial action embarked upon by one of the shifts, the company has decided to issue a final written warning to everyone who participated. However, unprotected industrial action (strike) is a dismissal offence in terms of our disciplinary code and the LRA. Therefore, this is the last time that a final written warning will be issued for such an offence. In future, from today onwards, the employee participating in unprotected industrial action will be dismissed on the first occasion.'

[6] On 29 September 2020, three employees, Mr Hobonwana, Ms Moodley and Mr Chauwe, representing their colleagues, approached the appellant's Human Resources payroll officer, Ms Kikana, to enquire about the payment of their TERS subsidies from the government. They were in receipt of a text message from the Department of Labour that their TERS monies for June, July and August 2020 had already been paid to the appellant. They were justifiably anxious and were informed that their money had been received. and a reconciliation was underway

[2] Not much is known of the second work stoppage, as the focus was primarily on the incident on 26 May 2020. The record does not indicate what was the cause of the work stoppage.

at the appellant's head office in Alberton, before payment could take place. A short while later, a notice was put up on the company notice board which read as follows:

> 'TERS PAYMENT – JUNE/ JULY/ AUGUST
>
> Dear Employees,
>
> Kindly note that Benteler have not received payment for June/July and August. As soon as we received confirmation we will put out a notice to inform you accordingly.'

[7] Ms Kikana's notice caused consternation and confusion among the employees who were desperately awaiting payment of the TERS allowances. Word filtered down to Mr Bezuidenhout, the production shift leader, that the employees were unhappy and he was forewarned of industrial action to take place the next day. It is significant to record that Ms Kikana's notice that no payment was received from the government was in contrast to the pleaded case of the appellant that the monies *had* been received but were awaiting reconciliation. The respondent contends that it is precisely this contradictory stance by the appellant which resulted in the employees on 30 September 2020 refusing to return to work until they were addressed by the plant manager, Mr Rosini, of the true position regarding their TERS monies.

[8] It is not disputed that the employees engaged in a work stoppage during the course of their 30-minute lunch breaks, which ended at 10h15, 10h30 and 10h45 respectively. The lunch intervals at the time were staggered to reduce close contact of workers in light of the COVID-19 pandemic. The employees refused to return to work at the end of their lunch breaks and remained away from their work stations for a period of between 25 and 40 minutes thereafter.

[9] During the period of the work stoppage, Mr Bezuidenhout demanded that the employees return to their work stations. They remained adamant that they would do so only after speaking with Mr Rosini. At this stage, the operations manager,

Mr De Vos, was alerted to what was unfolding. Eventually, Mr Rosini arrived at the scene but instead of holding discussions with the entire workforce, it was agreed that a delegation would meet with him, and at a quieter location. On the appellant's version and confirmed by Mr De Vos in his evidence, the remainder of the workforce returned to their work stations at about 11h10. While the meeting was in progress with Mr Rosini, Ms Kikana and Mr Bezuidenhout began to compile a list of employees who had not returned to their work stations after their lunch breaks. Following the meeting with Mr Rosini, the employees returned to work despite not having succeeded in their demands to be paid the TERS allowances.

[10] Subsequently, the disciplinary enquiry into the conduct of the NUMSA members who engaged in the work stoppage commenced in November 2020. An application for recusal of the chairperson, Mr Botes, was brought on the basis that he is employed by a company, Labournet, which renders labour advisory services to the appellant. The application was refused and the enquiry was adjourned to February 2021, after which it proceeded until its conclusion on 26 March 2021, when the employees were found guilty and dismissed.

[11] The contention of the appellant is that the short duration of the strike did not serve as a mitigating factor to avoid their dismissals, particularly as they had other means available to them to raise their demands via a recognition agreement between the appellant and NUMSA which specifically obliges the parties to refrain from engaging in unprotected industrial action. It was also the contention of the appellant that the employees had already been the recipients of a warning following a similar incident in May 2020, which cautioned that anyone engaging in similar industrial action would be dismissed.

<u>In the Labour Court</u>

[12] Following upon the failure to resolve the dispute through mediation, the matter was referred to the Labour Court in terms of s 191(5)*(b)*(ii) of the Labour Relations Act[3] (the LRA) for determination.

[13] The employees contended that they did not engage in an unprotected strike but rather that they refused to return to work until their demand to meet with Mr Rosini was met. Even if the work stoppage were interpreted as an unprotected strike, it is undisputed that it was of short duration and unaccompanied by any form of violence or destruction to company property. Critically, the employees contend that their demand from management was not for immediate payment of the TERS monies, but rather clarification when these monies would be paid because of the notice from Ms Kikana, contradicting her earlier advice that the monies had been received.

[14] It was disputed by the employees that they were ever involved in the work stoppage on 20 May 2020, and therefore any warning or notice issued at the time could not be held against the affected employees, nor could it constitute a warning. As far as the categorisation of the incident on 30 September 2020, the appellant contends that the employees engaged in an unprotected strike with the specific intention of resolving an issue in dispute between the employees and their employer. The appellant maintained that the strike was without justification, while the employees contend that conduct on the part of the managerial staff was the catalyst for the industrial action. On this basis, it was submitted that if they were guilty of any misconduct, it would have been more of a misdemeanour in not returning to work timeously than having engaged in an unprotected strike. In those circumstances, a written warning valid for six months would have sufficed.

[15] In analysing the evidence of the witnesses who testified before it, including that of Mr De Vos regarding the confusion which could result among the employees regarding the payment of their TERS monies and of Mr Bezuidenhout regarding applicability of the written warning on the notice board in May 2020, the court *a*

[3] Act 66 of 1995, as amended.

quo concluded that the ‘zero tolerance’ approach relied on by the appellant in support of its dismissal of the employees could not be sustained. Despite the earlier warning, the court found that it was incumbent upon the appellant to demonstrate that the sanction of dismissal, particularly in the context of the specific facts of this matter, was fair. It failed, in the view of the court *a quo*, to show that the sanction was proportionate to the conduct complained of.

[16] In regard to procedural fairness, the court *a quo* found that the ultimatum issued to the employees on 30 September 2020 was insufficient to provide for an opportunity for reflection and to take advice regarding their predicament. It also found that the appellant’s decision to utilise the services of Mr Botes, given his affiliation with Labournet, constituted a well-founded basis for his recusal. It was also not unreasonable to conclude that he had prejudged the case against the NUMSA members, having already heard and found the AMCU members guilty on the same charge.

[17] The Labour Court accordingly concluded that the dismissal was procedurally and substantively unfair and ordered the reinstatement of the employees. It also found the appellant liable for the cost of the proceedings on the grounds that it considered such an order ‘fair’.

<u>Grounds of appeal</u>

[18] The grounds of appeal can be summarised as including the following mistakes of law:

18.1. That the dismissals were both substantively and procedurally unfair;

18.2. That Mr Bezuidenhout issued the employees with an ultimatum to return to work in light of them engaging in an unprotected illegal strike;

18.3. That the willingness of Mr Rosini to meet with the striking employees was an acceptance of the veracity of their demands and grounds for their complaints;

18.4. That the reason for the employees to go on strike was objectively fair;

18.5. In relation to procedural fairness, the court *a quo* erred in concluding that, in light of the retainer agreement between the appellant and Labournet, with whom Mr Botes was employed, constituted an objective basis for his recusal;

18.6. That Mr Botes, by presiding over a second enquiry of NUMSA members charged with the same allegations and pertaining to the same facts and witnesses as an earlier enquiry against AMCU members, could not have been impartial and ought to have recused himself, and

18.7. That the award of costs, without any objective reasons advanced, constituted a misdirection.

<u>Analysis</u>

[19] The first aspect requiring clarification is what exactly was the incident on 30 September 2020? Section 213 of the LRA defines a strike as a:

> '… partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and *employee*, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.'

A strike comprises an act or omission; it must be concerted, and it must be directed at the achievement of a specific purpose. Whether the purpose of the employees refusing to return to work was a demand that they be paid their TERS monies or whether it was that they be addressed by the plant manager, Mr Rosini, I am satisfied that their actions on 30 September 2020 constituted a strike. I did not understand Mr Le Roux, who appeared on behalf of the employees, to take issue with the categorisation of the work stoppage as a strike. His argument, which I consider below, was primarily focused on the underlying cause for the work stoppage and, in that context, whether dismissal was an appropriate sanction in the circumstances.

[20] Dr Orton, who appeared on behalf of the appellant, placed much emphasis on the existence of a collective agreement between the parties, which obligated them to use the procedures contained in the agreement to resolve disputes. The strike by the employees on 30 September 2020 was in violation of the agreement and consequently constituted serious misconduct.

[21] The appellant contended that prior to the strike on 30 September 2020, all employees were alerted on 26 May 2020 to the consequences of dismissal if they engaged in similar, unprotected strike action. Specifically, it was an attempt to bring the dismissed employees into the orbit of those employees who were already under the threat of the warning issued on 26 May 2020. It is significant that in his testimony, Mr De Vos conceded that the present employees were not part of the group who engaged in the strike on 26 May 2020, or on any other date. His evidence is corroborated by a list prepared by the appellant and referred to during the enquiry, which reflects the names of all the dismissed employees. In a separate column, none of the employees are recorded as having participated in the walkout on 20 May 2020. Accordingly, the appellant's attempt to cast the dismissed employees as belligerent, repeat offenders who could not be trusted, quickly dissipated.

[22] As a rear-guard manoeuvre and an attempt to draw these employees into the group that engaged in industrial action in May 2020, it was submitted that the strike action occurred on two different dates. Although the record and the evidence indicate a reference only to one incident of industrial action on 20 May 2020, no list appears in respect of employees who may have participated in such conduct on 26 May 2020.[4] On the contrary, the wording of the charge at the disciplinary enquiry accepts as a fact that the employees engaged in the work

[4] A possible explanation could lay in the date of 20 May being an error, instead of 26 May.

stoppage on 30 September 2020 were all issued with prior warnings or were aware of earlier warnings against striking.[5]

[23] Against the backdrop of the evidence of Mr De Vos that the employees were confused as to what was transpiring with the non-payment of their TERS monies, coupled with the notice from Ms Kinana that the monies had not been received and the brief duration of the strike during which there were no instances of violence or destruction to property, the appellant maintained that their dismissal was fair and justifiable in the circumstances. It was submitted Dr Orton that the brief duration of the strike was irrelevant and that it should be seen in the context of an unprotected, illegal strike, for which dismissal was appropriate.

[24] This argument does not survive scrutiny, especially when viewed holistically against the evidence where all employees returned to work after it was agreed that a delegation would meet with Mr Rosini to obtain clarity as to why their monies had not been received. In addition, despite the appellant contending that the employees demanded immediate payment, the evidence reveals that once Mr Rosini agreed to meet with the delegation, the employees returned to work despite no payment being made to them. This is consistent and favours the employees' version that they wanted to discuss the matter with senior management rather than withholding their labour until they were paid. It also supports the contention by Mr le Roux that if the employees were guilty of any misdemeanour it would have been for not returning to their work stations timeously for which a warning would have been sufficient.

[25] The attempt to suggest that the appellant sustained a loss of R400 000.00 due to the strike was not only an overestimation, as it was based on a calculation of daily sales per hour rather than on the cost of production. In addition, it is common cause that the strike lasted, at its longest, for 40 minutes. There is no

[5] Part of the charge of 'Participating in unprotected industrial action' read as follows *"Your actions amount to an unprotected strike as you did legislated dispute resolution procedures. This, you have done, despite being informed previously that any further industrial action will lead to dismissal. Your actions have reached the trust relationship"*.

evidence on record that no production took place during this time, or if it was reduced, by what percentage. It was further contended on behalf of the employees that any perceived loss in production could have easily been recuperated by requiring the employees to work back the time in small, inconspicuous segments. There is no evidence on record of any penalty incurred by the appellant for having failed to comply with production deadlines to any supplier as a result of the interruption caused by the strike.

[26] To the extent that the appellant in this Court persists that the sanction of dismissal was warranted, I have already alluded to the short duration, lack of violence or destruction to property, which militate against this being too harsh a penalty. I have also alluded to the employer wrongly assuming that all of the employees dismissed were either issued with, or aware of, previous warnings against them for industrial action. The fact that the employees may not have been issued with warnings at an earlier stage in the year appeared to be immaterial to the appellant. The appellant considered the offences to be dismissible, even if committed on the first occasion.

[27] In determining that the NUMSA members be summarily dismissed, the chairperson of the disciplinary enquiry, Mr Botes, concluded the employees *"committed conduct that is disruptive"* to the operations of the company. There is nothing in the record or on the evidence to substantiate how the work stoppage had wider ramifications. Once the employees returned to work on 30 September 2020, there were no further disruptions of any nature. The chairperson further concluded that the employment relationship was 'tainted' by their refusal to return to work as directed and that their conduct cannot be viewed as tolerable. Under those circumstances, dismissal was the only sanction considered to be appropriate.

[28] As I pointed out earlier, the enquiry into the AMCU members (approximately 20 in number) was already concluded, and, on 18 December 2020, Mr Botes recommended their dismissal. The enquiry into the NUMSA members concluded

on 10 March 2021, with Botes finding them guilty of engaging in an unprotected strike. On 26 March 2021, both sets of employees were informed of the appellant's decision to accept the recommendation of Mr Botes for their dismissal. In short, the appellant retained and obtained the benefit of the labour of 30 employees from 30 September 2020 to 26 March 2021, despite branding their conduct as 'disruptive to the operations of the company' and categorising their actions as 'extremely serious misconduct' despite the absence of any damage to company property and any subsequent acts of misconduct. In the case of the AMCU members, it was stated that the *"implementing [of] a lesser sanction than dismissal will result in a continued employment relationship where both the employer and employee party will be aware that the guilty employees have already shown a patent unwillingness to abide by the rules of the company… An employment relationship tainted by this knowledge cannot possibly be viewed as tolerable"*.

[29] It is clear that the chairperson parroted much the same reasoning he employed in determining the AMCU enquiry into the outcome of the NUMSA enquiry, heard almost three months after the former. As stated earlier, Mr Botes considered the same set of facts, and he would have heard evidence from the same witnesses on the same charges as he did in the first enquiry. It can safely be deduced under these circumstances, and at least in relation to the second enquiry for NUMSA members in March 2021, that Mr Botes could hardly come to a different conclusion from the first enquiry. The same can be said of his recommendation for dismissal.

[30] Mr le Roux raised this aspect as part of his argument in respect of procedural unfairness, without isolating this as a definitive feature of this leg of his defence of the court *a quo's* judgment. The point stressed by Mr Le Roux was that the appellant was satisfied to retain the services of both sets of employees for almost 6 months, yet it attributes their disruptiveness as a basis for their dismissal. It is inconceivable to sustain a claim for dismissal based on a breakdown of the trust relationship where the employees have continued to work for six months after the

event giving rise to the charges being brought against them and without any incident of misconduct against them during the six-month period while awaiting the outcome of the enquiry.

[31] The Labour Court found that the decision by Mr Botes not to recuse himself from the disciplinary enquiry based on the allegations of the perception that he would be biased against the union and in light of his familiarity with the company witnesses and Mr Botes undermined the fairness of the enquiry and ultimately his finding that the employees were guilty of serious misconduct. Mr Le Roux, in this Court, did not proceed to advance an argument in support of this finding by the court *a quo*. He conceded that our law in relation to a hearing before dismissal has evolved over the years from a sense of strict formalism to a more pragmatic approach, with a ring of informality and resembling more of an exercise in gathering evidence and allowing the party accused of certain allegations an opportunity to advance his or her version. Both counsel were in agreement that the yardstick for neutrality and independence set out in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited (Seafoods Division Fish Processing)*[6] was too lofty a standard to impose at the level of a disciplinary enquiry, particularly as any external chairperson would attract criticism on the basis that he or she would ultimately be paid by the employer for their services. The perception of bias can easily be mounted from this perspective. Instead, counsel associated themselves with the views articulated by Van Niekerk J in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*,[7] decided years prior to the present amendments to the Code of Good Practice: Dismissal in Schedule 8 to the LRA (the Code), as being consistent with pragmatism in the workplace.[8]

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[6] [2000] ZACC 10; 2000 (3) SA 705 (CC) at para 14.

[7] [2006] ZALC 44; (2006) 27 *ILJ* 1644 (LC). See A van Niekerk '*The Evolution of the Right to Fair Procedure in Dismissals for Misconduct'* (2024) *Acta Juridica* 55.

[8] Code of Good Practice: Dismissal in Schedule 8 of the LRA, issued on 4 September 2025 reflects a shift towards a less stringent, but fair procedure. It is aimed at 'genuine dialogue' and an 'opportunity for reflection'.

[32] However, Mr le Roux did not entirely abandon his attack on the procedural unfairness of the dismissals. He contended that even if Mr Botes' appointment as chairperson of the disciplinary enquiry were to survive scrutiny in this Court, the decision to hold separate enquiries, based on union affiliation, created the perception (at least for the NUMSA members in the second enquiry) that the issue of guilt and recommendation of dismissal had been pre-determined. I have already set out my reasons for this conclusion earlier. It is in this respect that Mr le Roux submitted that while the Code presently advocates that an enquiry should offer an opportunity for 'reflection', fairness is still the yardstick. Mr Le Roux urged against any attempt to 'water-down' the right to a fair hearing before an independent chairperson, who must be open to persuasion by the evidence presented.

[33] As tempting as it is to pronounce on the essential ingredients of a right to a fair hearing, particularly because of the far-reaching consequences that an unfair hearing can visit on an innocent employee, this is not an issue that I am required to pronounce on in this appeal. In *Albutt v Centre for the Study of Violence and Reconciliation and Others*,[9] the following was said:

> 'Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal…Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so...'

[34] Having regard to the totality of the evidence presented in the court *a quo,* I am satisfied that the appellant has not been able to point to any misdirection on the part of the court a quo in reaching its conclusion that the dismissal of all of the employees listed in Annexure "A" to the Statement of Claim was substantively unfair. As set out above, the genesis of the work stoppage was the confusion relating to the non-payment of their TERS allowances, owing to the contradictory messages from management. The reaction of the employees must be seen in the

[9] [2010] ZACC 4; 2010 (3) SA 293 (CC) at para 82.

context of the prevailing economic environment in the midst of the COVID pandemic, where countless jobs were being lost due to the lockdown. Their response was not in accordance with the strictures of the collective bargaining agreement in place at the time, however, I am satisfied that the court *a quo* arrived at a conclusion that is correct in law.

[35] I have earlier indicated that I part ways with the reasoning and findings of the court *a quo* in respect of procedural unfairness. Absolute neutrality from a chairperson of an internal enquiry, in the sense of someone totally disconnected from the employer, is an ideal that is difficult to achieve in the sphere of industrial relations. The respondent's counsel conceded that the test for recusal of Mr Botes, as found by the court *a quo*, was assailed by the arguments on appeal in this Court. I am satisfied that the court *a quo* was incorrect in law in arriving at the conclusion that the dismissal was procedurally unfair.

[36] Lastly, in relation to costs, the court *a quo* provided no reasons for its decision to direct that the employer be liable for the costs of the proceedings in that court. The established rule in litigation that costs follow the result does not apply in labour matters.[10] Section 162(1) of the LRA requires that in awarding costs, the court must exercise its discretion. In doing so, it must provide reasons where it departs from the ordinary rule that costs should not be ordered.[11]

[37] I find that the court *a quo* misdirected itself in respect of its award on costs, especially as the relief ordered restores the employment relationship between the parties.

[38] In the result, I make the following order:

<u>Order</u>

[10] *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1; (2018) 39 *ILJ* 523 (CC) at para 24.

[11] *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others* [2021] ZACC 26; (2021) 42 *ILJ* 2371 (CC) para 24.

1. The appeal succeeds to the extent that the order of the court *a quo* is varied and substituted with the following:

    '(a) The dismissal of the applicants is found to be substantively unfair;

    (b) The applicants are to be reinstated retrospectively from the date of their dismissal on 26 March 2021 on terms no less favourable to the terms that applied on the date of their dismissal, adjusted according to the industry wage increases that became applicable since the date of their dismissal, with payment of backpay according to annexure 'A' to the heads of argument of the applicants;

    (c) There is no order as to costs.'

2. There is no order as to costs.

Chetty AJA
Acting Judge of the Labour Appeal Court

Mahalelo ADJP *et* Nkutha-Nkontwana JA concur.

APPEARANCES:

FOR THE APPELLANT: Dr R Orton

Instructed by Snyman Attorneys

FOR THE RESPONDENT: F E Le Roux

Instructed by Pagdens Inc