



South African Institute of Race Relations
The power of ideas

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Dear Ms Lumley,

Dischem moratorium: unconstitutional, and counterproductive

We call on you to end your moratorium on hiring people that happen to be white. Instead, you should appoint and promote people based on merit.

In 2020 the Institute of Race Relations hired an independent expert to conduct a nationwide, demographically representative, statistically significant opinion survey. One question asked: “Who should be appointed to jobs in SA?”

The first two options were “Only blacks for a long time ahead” and “Only blacks ‘til demographically representative”, either of which amounts to your policy. Combined almost 15% of white respondents and less than 20% of black respondents approved of this hiring policy.

However, over 60% of black respondents preferred “appointment on merit, with special training for the disadvantaged” and almost 20% preferred “all appointments on merit alone, without such training”. Combined the two “merit” answers were preferred by over 80% in each race group.

Simply put, the question of whether your policy is preferable or not divides the minority and the super-majority within races much more than across races. 80% want merit and we are right to want merit.

Dis-Chem's moratorium is inconsistent with the Constitution, which identifies 'non-racialism' as a founding value of South Africa's democracy. In addition, it contradicts the equality clause (Section 9), which bars the private sector from unfairly discriminating against people on the basis of their race – and says that any discrimination on racial grounds 'is unfair' unless the contrary is proved.

Three flawed Constitutional Court judgments (handed down against government departments, rather than private companies) have seemingly sanctioned the rigid racial quota that Dis-Chem is applying. But these rulings overlook the three-fold test for the validity of race-based affirmative action measures laid down by the Constitutional Court in the *Van Heerden* case in 2004.

According to the *Van Heerden* ruling, 'authorised remedial measures' must meet three tests: they must (1) target the disadvantaged, (2) be designed to advance them, and (3) promote the achievement of equality.

Dis-Chem's moratorium will not 'target the disadvantaged'. If anything, it will benefit the most skilled and politically connected group within the black population. By contrast, the great majority of under-educated, poorly skilled, and often unemployed black South Africans will not gain at all.

Second, Dis-Chem's moratorium must be 'designed to advance' the truly disadvantaged. But it will instead harm them, as the merit principle is jeopardised and the gross inefficiencies already evident in the public service percolate into the private sector too. This will reduce competitiveness, limit growth, and worsen the unemployment crisis.

Third, Dis-Chem's moratorium will not promote the 'achievement of equality'. Instead, it will further increase the gap between a small black political elite and more than 11

million black South Africans who remain jobless and destitute. This intra-black gap is the main cause of rising inequality since 1994.

Dis-Chem's moratorium cannot satisfy the three *Van Heerden* tests and is unconstitutional.

Instead of infringing both the Employment Equity Act and the Constitution, it is time for Dis-Chem and other companies to take a stand. The Constitution bars unfair discrimination against South Africans of all colours. It allows affirmative action only if it meets the *Van Heerden* tests. And it requires 'broad representivity' (not fixed quotas) solely in the public service, not the private sector.

If remedial measures are to benefit more than a small black elite (what India calls 'the creamy layer'), they must bring down the real barriers to black advancement. These barriers include dysfunctional schooling, collapsing public administration, escalating blackouts and 'water shedding', and countless policy obstacles to the investment, growth and employment that offer the only sure path to rising prosperity for all.

We know that you are worried about race-laws causing you to be fined. These laws are a fundamental problem that we are committed to fighting. Do not bend your knee to race-laws. Stand up and become part of the solution.

Regards,

Gabriel David Crouse (IRR Head of Campaigns) and Mlondi Mdluli (IRR Campaign Manager)