CHAPTER 12

CESSION = TRANSFER OF RIGHT BY AGREEMENT

CEDENT = PERSON WHO CEDES RIGHTS

Cessionary = PERSON TO WHOM RIGHTS ARE TRANSFERRED

PENSION & MAINTENANCE CANNOT BE Ceded

Does not terminate obligation & does not create new obligation

Rights flowing from contract = personal rights

Personal right = capable of being transferred

Rights flowing from contract = personal rights

Cession effected without formality (normally)

Debtor can have counter-claim against cedent

Right can be ceded only in entirety

Right cannot be ceded if encumber debtor with materially different obligation

Debtor can have counter-claim against cedent

Right cannot be ceded
CONSEQUENCES OF CESSION

(A) RIGHT NOW FORMA PART OF PATRIMONY OF CESSIONALY & NOT OF CEDENT

(B) CESSIONARY ALONE HAS RIGHT TO COLLECT DEBT

(C) ONCE CEDENT HAS CEDED CLAIM - CAN NO LONGER BE CEDED TO ANOTHER. CESSIONARY CAN CEDE FURTHER

(D) AFTER CESSION, DEBTOR CAN NO LONGER PERFORM VALIDLY TO CEDENT (IF DEBTOR PAYS CEDENT IN GOOD FAITH - RELEASED FROM LIABILITY)

(E) CLAIM = TRANSMITTED TO CESSIONARY IN ITS ENTIRETY TOGETHER WITH ALL BENEFITS & PRIVILEGES SUCH AS SECURITY / INTEREST

(F) CESSIONARY ALSO RECEIVES RIGHT WITH ALL DISADVANTAGES ATTACHED TO IT
PRIMARY PURPOSE OF CONTRACTUAL OBLIGATIONS - SHOULD BE FULFILLED BY DUE & PROPER PERFORMANCE

DISCHARGE (FULFILMENT): PERFORMANCE OF OBLIGATION UNDERTAKEN

BILATERAL - DEBTOR NEEDS CREDITOR'S CO-OPERATION

BILATERAL DISCHARGED - BOTH PARTIES PERFORMED FULLY

DISCHARGED NOT ACCOMPLISHED BY DEFECTIVE PERFORMANCE

LEGAL TENDER = COINS & NOTES, CHEQUE = NOT LEGAL TENDER

DEBTOR MAY WITHHOLD PAYMENT IF CREDITOR REFUSES TO GIVE RECEIPT

CAN BE BILATERAL / UNILATIRAL JURISTIC ACT

DISCHARGE
INTEREST = PAID BEFORE CAPITAL

DUE DEBTS ARE PAID BEFORE DEBTS WHICH HAS NOT YET FALLEN DUE

OLEROUS DEBTS (MORTGAGE BONDS) HAVE PREFERENCE OVER NON-OLEROUS DEBTS

OLD DEBTS HAVE PREFERENCE OVER NEW DEBTS

PRINCIPLES FOR APPLYING DEBT
**RESCISSION & CANCELLATION**

**RESCISSION** = ACT OF WITHDRAWING FROM CONTRACT DUE TO REASONS OTHER THAN BREACH OF CONTRACT

**CANCELLATION** = WITHDRAWAL FROM CONTRACT DUE TO BREACH OF CONTRACT

**VOIDABLE CONTRACTS** - INNOCENT PARTY HAS CHOICE OF ENFORCING CONTRACT / RESCINDING IT

**IF INNOCENT PARTY DECIDES TO RESCIND** - CONTRACT TERMINATED

**INNOCENT PARTY HAS CHOICE OF ENFORCING CONTRACT / RESCINDING IT**
PARTIES CAN AGREE TO END CONTRACTUAL RELATIONSHIP

AGREEMENTS FOR TERMINATION OF CONTRACTUAL OBLIGATIONS:
(1) RELEASE
(2) NOVATION
(3) SETTLEMENT
RELEASE (WAIVER)

AGREEMENT BETWEEN CREDITOR & DEBTOR WHICH CREDITOR RELEASES DEBTOR FROM OBLIGATIONS

EXPRESSLY / TACITLY

OFFER OF RELEASE - NOT RELEASE - CONSENSUS = LACKING

DONATION

DEBTOR ALSO RELEASES CREDITOR FROM OBLIGATION
Novation Agreement

- Novation can be made subject to conditions.
- Agreement between debtor & creditor to which old obligation is extinguished & new obligation created.
- Existence of valid initial obligation is prerequisite for existence of valid novation.
- If novation is void, old obligation remains in force unless parties agreed to abandon it.
DELEGATION

Specific form of novation

New party = introduced

Co-operation from all 3 parties are required

Old obligation = extinguished, new obligation created

Change of creditors / change of debtors
AGREEMENT BY WHICH PARTIES SETTLE DISPUTE ABOUT ACTUAL / SUPPOSED OBLIGATION

IF DEBTOR DOES NOT PERFORM ACCORDING TO TERMS OF SETTLEMENT, CREDITOR MAY FALL BACK ON ORIGINAL DEBT ONLY WHERE TERM OF SETTLEMENT THAT CREDITOR HAVE THIS RIGHT

VALIDITY DOES NOT REQUIRE VALID DEBT

IF VALID DEBT - EXTINGUISED BY SETTLEMENT

SETTLEMENT (COMPROMISE) (TRANSACTIO)
MERGER (CONFUSIO) takes place when person becomes both creditor & debtor in respect of same obligation. A person cannot owe something to self - debt = extinguished. Merger automatically terminates obligation. Example: married in community of property.
SET-OFF

EXTINGUISING DEBTS OWNED RECIPROCALLY BY 2 PARTIES

(A) DEBTS MUST BE SIMILAR IN NATURE

(B) DEBTS MUST BE LIQUIDATED (VALUE CERTAIN / ASCERTAINABLE)

(C) DEBTS MUST BE CLAIMABLE

(D) DEBTS MUST BE BETWEEN SAME PERSONS

SET-OFF AUTOMATICALLY TERMINATES RESPONSIBILITIES
IMPOSSIBILITY OF PERFORMANCE SUPERVENING AFTER CONCLUSION OF CONTRACT

MUST NOT BE DUE TO FAULT BY EITHER PARTY

EXTERNAL FACTOR BEYOND CONTROL (EXCEPTIONAL FORCES OF NATURE/WAR/DEATH)

CONTRACT TERMINATED
Consequences of Supervening Impossibility of Performance

As rule, extinguishes obligations of contract.

Where party agrees to assume responsibility for supervening impossibility, obligation not terminated.

N/A where 1 party agreed to assume responsibility for supervening impossibility.
OBJECTIVE & SUBJECTIVE IMPOSSIBILITY OF PERFORMANCE

OBJECTIVE IMPOSSIBILITY - NOT FAULT - TERMINATES OBLIGATION (RECIPROCAL - EXTINGUISHES COUNTER-OBLIGATION)

SUBJECTIVE IMPOSSIBILITY: SPECIFIC DEBTOR'S INABILITY TO PERFORM DOES NOT RELIEVE FROM LIABILITY

OBJECTIVE IMPOSSIBILITY - RELIEVED OF LIABILITY

COMMERCIAL CIRCUMSTANCES - NOT OBJECTIVELY IMPOSSIBLE
TEMPORARY & PARTIAL IMPOSSIBILITY OF PERFORMANCE

DIVISIBLE PERFORMANCE - PARTIALLY IMPOSSIBLE - WHOLE OBLIGATION NOT TERMINATED (RELEASED PROPORTIONATELY - PERFORMANCE & COUNTER-PERFORMANCE)

INDIVISIBLE PERFORMANCE - PARTIALLY IMPOSSIBLE - SAME CONSEQUENCES AS TOTALLY IMPOSSIBLE (UNLESS CREDITOR ACCEPTS PARTIAL PERFORMANCE) - COUNTER-PERFORMANCE REDUCED

SAME PRINCIPLES IF CONTINUING OBLIGATION BECOMES TEMPORARILY IMPOSSIBLE
NATURE OF PRESCRIPTION

ACQUIRING RIGHTS - ACQUISITIVE PRESCRIPTION

BE RELEASED FROM OBLIGATIONS - EXTINCTIVE PRESCRIPTION

IF CREDITOR NEGLIGENT - DEEMED TO KNOW IF DEBT

WHERE DEBTOR WILFULLY PREVENTS CREDITOR FROM KNOWLEDGE OF EXISTENCE OF DEBT - PRESCRIPTION WILL NOT BEGIN TO RUN UNTIL CREDITOR KNOWS

PRESCRIPTION = TO BRING ABOUT LEGAL CERTAINTY

EXTINCTIVE PRESCRIPTION = WAY IN WHICH CONTRACTUAL OBLIGATIONS MAY BE TERMINATED
PRESCRIPTION ACT 68 OF 1969 PROVIDES FOR CIRCUMSTANCES WHERE IMPOSSIBLE FOR CREDITOR TO ENFORCE RIGHTS:

- CREDITOR = OUTSIDE OF REPUBLIC
- DEBTOR & CREDITOR = MARRIED
- CREDITOR = MINOR / INSANE / UNDER CURATORSHIP / PREVENTED BY SUPERIOR FORCE FROM INTERRUPTING RUNNING OF PRESCRIPTION
- CREDITOR & DEBTOR ARE PARTNERS & DEBT = DEBT WHICH AROSE OUT OF PARTNERSHIP RELATIONSHIP
- CREDITOR = JURISTIC PERSON & DEBTOR = MEMBER OF GOVERNING BODY OF JURISTIC PERSON
30 YEARS: DEBT SEURED BY MORTGAGE; JUDGMENT DEBT (CLAIM AGAINST SURETY); ANY TAXATION IMPOSED / LEVIED BY / UNDER ANY LAW; DEBT OWED TO STATE - SHARE OF PROFITS, ROYALTIES / SIMILAR CONSIDERATION PAYABLE - RIGHT TO MINE MINERALS / OTHER SUBSTANCES

3 YEARS: IN RESPECT OF ANY OTHER DEBT (SAVE HERE ACT OF PARLIAMENT PROVIDES OTHERWISE)

6 YEARS: DEBT ARISING FROM BILL OF EXCHANGE / OTHER NEGOTIABLE INSTRUMENT / FROM NOTARIAL CONTRACT; UNLESS LONGER PERIOD APPLIES IN RESPECT OF DEBT IN QUESTION

15 YEARS: ANY DEBT OWNED TO STAE & ARISING FROM ADVANCE / LOAN OF MONEY / SALE / LEASE OF LAND BY STATE UNLESS LONGER PERIOD APPLYS IN RESPECT OF DEBT IN QUESTION

PRESCRIPTION PERIODS
SEQUESTRATION & SUBSEQUENT REHABILITATION

WHEN DEBTOR UNABLE TO PAY - 1 / MORE OF CREDITORS MAY APPLY TO HIGH COURT FOR SEQUESTRATION

AFTER SEQUESTRATION, DEBTOR'S PROPERTY TRANSFERRED TO TRUSTEE

TRUSTEE SELLS PROPERTY & DIVIDES PROCEEDS AMONG CREDITORS

SEQUESTRATION ORDERS DOES NOT TERMINATE CONTRACTS CONCLUDED PRIOR TO INSOLVENCY

SOME CONTRACTS TERMINATED (CONTRACT FOR MANDATE - MANDATOR = SEQUESTRATED)

IF CONTRACT NOT TERMINATED - ANY REMAINING OBLIGATIONS - EXTINGUISHED WHEN SEQUESTRATION LATER TERMINATED BY REHABILITATION UNLESS AROSE FROM FRAUD