DOES ‘HUUR GAAT VOOR KOOP’ PROTECT ALL RIGHTS UNDER A LEASE?

The maxim ‘huur gaat voor koop’ is familiar to most landlords and tenants, although the exact content of the protection afforded by this rule of our law can leave one with misgivings. For example, assuming that landlord A sold to X his property which he rented to B, it is accepted that the maxim will protect the rights of B so that the lease remains in place after the sale of the property to X. But presuming, for example, that the lease contained an option to purchase the property or a clause regulating the payment of commission to the leasing agent used by the landlord, would such provisions also be covered by this maxim?

Background
The essence of the maxim in our law is that the tenant is protected against third parties whose rights vested later in time than those of the tenant. It is particularly valuable to a tenant in the event of a new purchaser seeking to evict him.

What rights do the maxim protect?
Our Courts have held that the protection offered by the maxim is of a sui generis nature (i.e. it is of a unique character and therefore not similar to other forms of protection recognised in our law). The protection afforded by the maxim includes that the tenant is bound to pay rent to the purchaser and the purchaser, in turn, is bound to the tenant regarding the provisions of the lease agreement. It is often said that in terms of this maxim, the purchaser “steps into the shoes” of the landlord. No new agreement of lease comes into existence; all that happens is that the purchaser is substituted for the seller as lessor without the necessity for a cession of rights or an assignment of obligations.

Stepping into the shoes of the seller – but to what extent?
All the rights and obligations in terms of the existing lease agreement are not, without more, protected under the maxim huur gaat voor koop. Since the maxim essentially protects a tenant from eviction, our Courts have pronounced that a “purchaser is bound on it [the lease] by the doctrine of huur gaat voor koop, and bound also by all its material terms.” (Our emphasis) This means that the maxim only transfers rights that are the material and usual incidences of the direct relation between the landlord and the tenant, such as those arising in relation to occupation.

As such, our Courts have maintained that an option to purchase is not an integral part of the landlord-tenant relationship in respect of which the huur gaat voor koop rule operates. Thus, in Spearhead Property Holdings v E & D Motors (2010) it was held that a tenant
cannot exercise an option to purchase the leased property contained in the lease, against the subsequent purchaser in terms of this maxim. The reason is that a tenant who seeks to exercise an option to purchase will usually have to do so against the grantor of the option. Of course, the doctrine of notice has the effect that where the purchaser was made aware of the option by the tenant, the tenant will generally be able to claim transfer of the property from the purchaser.

Similarly, the same argument may apply with regard to a leasing agent's commission contained in the lease agreement. Usually such a clause makes commission payable on a monthly basis as part of the rental amount, or as a once-off payment on conclusion and/or renewal of the lease. Such payments are generally not material to the landlord-tenant relationship and are therefore ancillary rights, not protected by the maxim. In such instances it would be advisable for a seller, agent (in terms of the lease) and new purchaser to arrange their obligations separately to avoid litigation.